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United States
Court of Appeals
for the Ninth Circuit

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS LOCAL UNION No.
183, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, AFL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record

Petition to Review and Set Aside an Order of the
National Labor Relations Board

FILED

No. 14779

United States
Court of Appeals
for the Ninth Circuit

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS LOCAL UNION No.
183, INTERNATIONAL BROTHERHOOD
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**Petition to Review and Set Aside an Order of the
National Labor Relations Board**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

MARCEL MALLET-PREVOST, ESQ.

Assistant General Counsel, National Labor Re-
lations Board, Washington, D. C.,

For Petitioner, National Labor Re-
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BASSETT, GEISNESS & VANCE,

811 New World Life Bldg.,
Seattle 4, Washington,

For Respondents, Teamsters, Chauffeurs,
Warehousemen and Helpers, Local
Union No. 183, Etc.

United States of America
National Labor Relations Board

Form NLRB-501

CHARGE AGAINST EMPLOYER

Do Not Write in This Space

Case No: 19-CA-1158.

Date Filed: August 9, 1954.

Compliance Status Checked By: N.M. 11-2-54.

Important—Read Carefully

Where a Charge Is Filed by a Labor Organization, or an Individual or Group Acting on Its Behalf, a Complaint Based Upon Such Charge Will Not Be Issued Unless the Charging Party and any National or International Labor Organization of Which It Is an Affiliate or Constituent Unit Have Complied With Section 9 (f), (g), and (h) of the National Labor Relations Act.

Instructions: File an Original and 4 Copies of This Charge With the NLRB Regional Director for the Region in Which the Alleged Unfair Labor Practice Occurred or is Occurring.

1. Employer Against Whom Charge Is Brought:
Name of Employer: Alaska Beverage Co.
Address of Establishment: Fairbanks, Alaska.

No. of Workers Employed: Seven (7).

Nature of Employer's Business: Beverage Bottling
& Coca-Cola Distributing.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a), Subsections (1) and 8 a (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

The Teamsters Union Local 183 had an Election in the Alaska Beverage Co. plant on May 26th, 1953, which was conducted by the National Labor Relations Board and was Certified as the bargaining representative for the Employees. Bargaining was started soon after this date between the Union Representative and Mr. H. W. Robinson, who is an owner of the plant. Since Mr. Robinson's residence is in the State of Connecticut it was very difficult for the Union to get Mr. Robinson to spend enough time in Alaska to Bargain. There was an elapse of time when there was little or no bargaining going on until about April, of 1954, at which time the bargaining was resumed. After we resumed the bargaining and had met with Mr. Robinson twice, the union was made an offer of a monthly scale by Mr. Robinson as a counter proposal to the hourly scale that the Union had asked for. This was turned down by the Union at first and later was accepted

by the Union. When the Union met with Mr. Robinson and told him that we would accept this monthly scale, he told the Union that he had changed his mind and would like an hourly scale which was below the hourly scale that the Union had asked in the first place. Since this time we (the Union) have not been able to bargain further with Mr. Robinson and the Employees went out on strike on the 28th day of June, 1954, in an effort to get Mr. Robinson to bargain further. This we believe was not bargaining in good faith on his part after we had given up the hourly scale and had accepted his proposal of a monthly scale. If there is any more information you need in relation to this case we will send it as soon as possible.

3. Full Name of Labor Organization, Including Local Name and Number, or Person Filing Charge:

Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 183, A. F. of L.

4. Address:

P.O. Box 609 Fairbanks, Alaska, 315 Fifth Ave.
Telephone No.: 5238.

5. Full Name of National or International Labor Organization of which it is an affiliate or constituent Unit (To be filled in when charge is filed by a labor organization).

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Affil. with the A. F. of L.

6. Address of National or International, if any:
100 Indiana Ave., N.W.
Washington 1, D.C.

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ MICHAEL CSEREPES,
Business Representative Teamsters Union Local
No. 183.

August 7, 1954.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80).

Received in evidence as General Counsel's Exhibit No. 1-A, November 22, 1954.

United States of America Before the National
Labor Relations Board, Nineteenth Region
Case No. 19-CA-1158

HOMER W. ROBINSON d/b/a ALASKA BEV-
ERAGE CO.

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL UNION
NO. 183, AFL

COMPLAINT

It having been charged by Teamsters, Chauffeurs,
Warehousemen and Helpers, Local Union No. 183,

AFL, Post Office Box 609, Fairbanks, Alaska, under date of August 9, 1954, that Homer W. Robinson d/b/a Alaska Beverage Co., Fairbanks, Alaska, hereinafter called Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce, as set forth and defined in the Labor Management Relations Act, 1947, as Amended, 61 Stat. 136, hereinafter called the Act, the General Counsel for the National Labor Relations Board, hereinafter called the Board, by the Regional Director for the Nineteenth Region of the Board, hereby alleges as follows:

I.

Homer W. Robinson, sole owner, hereinafter called Respondent, is and has been at all times material herein doing business under the trade name and style of Alaska Beverage Co. by virtue of the laws of the Territory of Alaska, having his principal office and place of business at Fairbanks, Alaska, and is now and has been at all times herein mentioned continuously engaged at said place of business, hereinafter called the Fairbanks Plant, in the manufacture, sale and distribution of carbonated beverages.

Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II.

A copy of the charge hereinabove referred to was served on Respondent by Registered Mail on August 10, 1954.

III.

Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 183, AFL, hereinafter called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

IV.

In order to insure to the employees of Respondent the full benefit of the right to self organization and collective bargaining, and otherwise effectuate the policies of the Act, all employees of Respondent employed at its Fairbanks Plant, exclusive of supervisory employees, constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

V.

On or about May 26, 1953, a majority of the employees of Respondent in the unit described above in paragraph IV, designated or selected the Union as their representative for purposes of collective bargaining with Respondent, and at all times since that date the Union has been the representative for purposes of collective bargaining of a majority of the employees in said unit, and by virtue of Section 9(a) of the Act has been and is now the exclusive representative of all the employees in said unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

VI.

On or about April 23, 1954, May 12, 1954, May 18, 1954, and at various and sundry times since, the

Union requested Respondent to bargain collectively in respect to rates of pay, wages, hours of employment or other conditions of employment, with the Union as the exclusive representative of all the employees of Respondent in the unit described above in paragraph IV.

VII.

On or about April 23, 1954, and at all times thereafter, Respondent did refuse and continues to refuse to bargain collectively with the Union as the exclusive representative of all the employees in the unit described above in paragraph IV.

VIII.

On or about June 28, 1954, the employees of Respondent employed at its Fairbanks Plant ceased work concertedly and went on strike.

IX.

The strike described above in paragraph VIII was caused by the unfair labor practice of Respondent described above in paragraph VII, and prolonged by the unfair labor practice described above in paragraph VII.

X.

By the acts described above in paragraph VII Respondent did engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8(a)(5) of the Act.

XI.

By the acts described above in paragraph VII and by each of said acts, Respondent did interfere

with, restrain and coerce, and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in and is thereby engaging in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

XII.

The activities of Respondent described above in paragraph VII, occurring in connection with the operations of Respondent described above in paragraph I, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XIII.

The acts of Respondent described above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5), and Section 2(6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board has caused this Complaint to be signed and issued by the Regional Director for the Nineteenth Region, on the 4th day of November, 1954, against Homer W. Robinson d/b/a Alaska Beverage Co., the Respondent herein.

/s/ THOMAS P. GRAHAM, JR.,
Regional Director.

Received in evidence as General Counsel's Exhibit No. 1-C, November 22, 1954.

Before the National Labor Relations Board

[Title of Cause.]

ANSWER

The Respondent, for answer to the complaint and charges herein, admits, denies and alleges as follows:

I.

Answering paragraph I of said complaint, the Respondent alleges that Alaska Beverage Co. is actually a co-partnership in which the Respondent is the sole active partner, and that he has full authority to represent and bind his undisclosed partner in all matters relating to the business affairs of Alaska Beverage Co.

Answering the second paragraph set forth in said Paragraph I, the Respondent admits that his company is engaged in commerce within the meaning of Section 2(6) of the Act, in that all activities of his company are limited to and located within the Territory of Alaska, but the Respondent expressly denies that his company is engaged in commerce within the meaning of Section 2(7) of said Act.

II.

The Respondent admits the allegations contained in paragraph II of the complaint herein.

III.

The Respondent admits the allegations contained in paragraph III of the complaint herein.

IV.

The Respondent admits the allegations contained in paragraph IV of the complaint herein.

V.

The Respondent admits the allegations contained in paragraph V of the complaint herein.

VI.

Answering paragraph VI of said complaint, the Respondent admits that on or about the specific dates alleged in said paragraph, the Union requested negotiations, and Respondent alleges that at all times on or about said dates he, in good faith, entered into negotiations with representatives of the Complainant. The Respondent expressly denies the allegation "and at various and sundry times since, the Union requested Respondent to bargain * * *"

In further answer to said general allegation, which is denied, the Respondent alleges that there have been to his knowledge no requests for negotiations, and that the Respondent has at all times been and now is willing to negotiate with the Complainant.

VII.

Respondent, answering the allegations of paragraph VII of the complaint herein, denies each and all of the allegations and the inferences to be drawn therefrom set forth in said paragraph.

VIII.

The Respondent admits the allegations contained in paragraph VIII of the complaint herein.

IX.

Respondent, answering the allegations of paragraph IX of the complaint herein, denies each and all of the allegations and the inferences to be drawn therefrom set forth in said paragraph.

X.

Respondent, answering the allegations of paragraph X of the complaint herein, denies each and all of the allegations and the inferences to be drawn therefrom set forth in said paragraph.

XI.

Respondent, answering the allegations of paragraph XI of the complaint herein, denies each and all of the allegations and the inferences to be drawn therefrom set forth in said paragraph.

XII.

Respondent, answering the allegations of paragraph XII of the complaint herein, denies each and all of the allegations and the inferences to be drawn therefrom set forth in said paragraph.

XIII.

Respondent, answering the allegations of paragraph XIII of the complaint herein, denies each and all of the allegations and the inferences to be drawn therefrom set forth in said paragraph.

Further answering the charges and complaint herein, the Respondent alleges:

I.

That at all times material hereto, Respondent has bargained and has been ready to bargain in good faith with representatives of the Union.

II.

That following the Union's certification as bargaining representative of Respondent's employees on or about May 26, 1953, Respondent never received a request from the Union for bargaining and negotiations relating to any contract until on or about April 18, 1954. That immediately upon receiving notification of the Union's desire to settle contract terms, Respondent notified the Fairbanks representative that he would be available for negotiations in Fairbanks on or about May 12, 1954. That the Respondent returned to Fairbanks on said day for the express purpose of meeting with representatives of the Union. That various and numerous discussions relating to contract terms, wages and working conditions were held. That prior to such negotiations, Respondent's employees had been on regular monthly salaries, and Respondent expressed a desire to continue such method of compensation if the employees approved thereof. That at first the Union objected thereto, and fearing that the certification which had been issued by this Board would expire, unless a contract were signed before May 26, 1954, threatened to strike, unless Respondent accepted the contract proposed by the Union.

That to bring pressure upon Respondent, the Union called Respondent's employees off the job in order to enforce the Union's demands that a contract be entered into immediately and before the one-year period following certification expired. That Respondent, by wire, thereupon waived any

objections that he might have, if any, by reason of the expiration of such period, and the Union then directed the employees to return to work.

That thereafter the Union expressed a desire, after having objected to the monthly pay plan, to accept the same. That having knowledge of such rejection, Respondent then proposed a wage and classification plan similar to that in effect in the Anchorage area. That the Union insisted upon a proposed monthly salary, and that on or about June 15, 1954, Respondent was notified that the membership had rejected a monthly salary plan and demanded an hourly rate of pay.

That Respondent then requested that final negotiations of the contract be postponed until the Anchorage contract had been signed, informing the Union that it was Respondent's desire to adopt the same wage rates and classifications applicable in the Anchorage area. That Respondent notified the Union that he would be back in Fairbanks on July 10th to complete negotiations.

That thereafter, and on or about the 26th day of June, 1954, the Union discontinued negotiations, ignoring Respondent's request for continuance of negotiations until about July 10th when the Anchorage area contracts would be signed, and ordered a strike of Respondent's plant.

Further answering the charges and complaint herein, Respondent charges and alleges:

I.

That the conduct of the Union in calling a strike of Respondent's employees constituted a refusal to

bargain, and the Union thereby committed an unfair labor practice in violation of Section 8 of the National Labor Relations Act.

II.

That the Union, by threats and economic pressure, interfered with the rights of the Respondent to continue his normal business activities through employees who were not covered or represented under the Union bargaining rights and thereby committed illegal acts in violation of Section 8(a)(1) of the National Labor Relations Act.

III.

That the Union committed and is continuing unfair labor practices in violation of Section 8(b)(4) (a) by using economic pressure and unlawfully forcing other employers and employees who were not involved in the controversy to refrain from handling or selling any of Respondent's products, all for the purpose of forcing the Respondent to sign a contract which had not been fully negotiated between the parties, and for the further purpose of forcing the Respondent to accede to certain demands which had not been approved by the Respondent.

That these unfair labor practices upon the part of the Union have continued and now are continuing, and, except as to wage rates, the Union has made no counter proposals or offers to negotiate other terms and conditions of the contract.

Wherefore, the Respondent, having fully answered the complaint and charges herein, prays

that such charges and the complaint herein be dismissed, and that the Union be ordered to cease and desist from the continuance of the unfair labor practices charged by the Respondent.

/s/ E. L. ARNELL.

Duly verified.

Received in evidence November 22, 1954.

Before the National Labor Relations Board

[Title of Cause.]

CHARLES Y. LATIMER, ESQ.,
For the General Counsel.

E. L. ARNELL, ESQ.,
For the Respondent.

JOE MORGAN,
ROBERT J. DIXON,
MIKE CSEREPES,
For the Union.

Before: Ralph Winkler, Trial Examiner.

Intermediate Report and Recommended Order
Statement of the Case

Upon a charge filed by the above-named labor organization, herein called the Union, the General Counsel of the National Labor Relations Board issued a complaint dated November 4, 1954, against Homer W. Robinson d/b/a Alaska Beverage Co.,

herein called the Respondent, alleging that the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a) (1) and (5) and Section 2 (6) and (7) of the Labor Management Relations Act, 1947, 61 Stat. 136, herein called the Act. Copies of the complaint and the charge were duly served upon the Respondent, in response to which the Respondent filed an answer denying the unfair labor practices alleged.

Pursuant to notice, a hearing was held on November 22 and 23, 1954, at Fairbanks, Alaska, before the undersigned Trial Examiner. All parties were represented at the hearing and were given full opportunity to examine and cross-examine witnesses, and to introduce evidence bearing on the issues; they were also given opportunity for oral argument at the close of the hearing and to file briefs as well.

Respondent Robinson is engaged in the manufacture, sale, and distribution of carbonated beverages in Fairbanks, Alaska. During the past year the Respondent's purchases for this enterprise were valued at approximately \$75,500, of which amount 95 per cent was obtained from outside the Territory; Respondent's sales during the same period amounted to approximately \$226,000, all such sales being made within the Territory.

In June, 1953, following a Board-conducted election, the Union was certified as the statutory bargaining representative of Respondent's employees,

and the Respondent concedes that the Union has been the majority representative at all times since. The complaint alleges in substance that the Respondent has refused to bargain with the Union. Because, in my opinion, recent decisions of the Board require the dismissal of the present proceedings on grounds of jurisdictional policy, I shall not discuss the merits of the unfair labor practice issue presented by the complaint.

The Act, both in its original 1935 form and in the amended 1947 version, empowers the Board to prevent any person from engaging in unfair labor practices affecting "trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, *or within the District of Columbia or any Territory*,¹ or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country." (Italics added.) Congress has thus invoked its full plenary powers in making the Act applicable to all commerce "within" the Territories and the District

¹To be compared, for example, with the Fair Labor Standards Act of 1938 which defines "commerce" for purposes of that Act as trade, commerce, etc., "among the several States" and which specifically provides that "State means any State of the United States or the District of Columbia or any Territory or possession of the United States." 29 U.S.C.A. Section 203.

of Columbia, and the statutory authority of the Board within the Territories and the District of Columbia is, therefore, equally comprehensive. See *N.L.R.B. v. Gonzalez Padin Company*, 161 F. 2d 353 (C. A. 1); *Panaderia Sucesion Alonso*, 87 NLRB 877, 878.

The Board has exercised its plenary jurisdiction in the Territories and the District of Columbia since the Act's inception in 1935; and, though the legislative debates attending the 1947 amendments were long and vigorous, there is nothing in the Amendments and pertinent Committee Reports² to indicate that Congress did not intend to preserve the jurisdictional distinction prescribed in the Act between the Territories and the District of Columbia on one hand and the States on the other or that Congress disapproved of the Board's exercise of plenary authority in the Territories and the District of Columbia.

This, then, was the legislative context in which the Union invoked the Board's processes and went to an election in the aforementioned Representation case in 1953, and the Union has instituted the present case to implement its status as a certified bargaining representative.

In November, 1954, however, the Board issued its decision in *The Virgin Isles Hotel, Inc.*, 110 NLRB No. 65, a proceeding arising in St. Thomas

²H. Rept. 510, 80th Cong., 1st Sess. (1947); S. Rept. 105, 80th Cong., 1st Sess. (1947); H. Rept. 245, 80th Cong., 1st Sess. (1947).

Island, Virgin Islands. The Board decided, with Member Murdock dissenting, that there was no warrant for excepting hotels in the Territories and the District of Columbia from the Board's policy of not entertaining cases involving such industry in the States. Noting that "the Act gives the Board plenary jurisdiction over all business enterprises operating in ["the District of Columbia or any Territory"] the Board's stated rationale was that "the relationship to commerce is no greater here than in the case of a hotel operating in any of the 48 States and we do not believe that the impact on commerce is sufficient in either instance to warrant the assertion of jurisdiction." Member Murdock stated in his dissent that this case constitutes "a major alteration in this agency's jurisdictional policy," his argument being that a determination not to exercise plenary jurisdiction within the Territories and thus to withhold protection of the Act is one "which properly should be made by Congress."

Shortly after the decision in the Virgin Isles Hotel case, the Board issued its decision in *Sixto Ortega d/b/a Sixto*, 110 NLRB No. 251 (December 16, 1954), a proceeding involving a retail selling establishment in Santurce, Puerto Rico. In this case the Board, with Member Murdock dissenting, held that it would apply the same jurisdictional tests to retail selling organizations in Puerto Rico as it does to similar establishments in the 48 States. "Moreover," said the majority, "in future cases

involving other types of business or operations for which the Board has established specially applicable standards for taking jurisdiction in the 48 States, we shall apply the same standards for asserting jurisdiction in Puerto Rico." Member Murdock's dissent protested the Board's refusal to exercise plenary jurisdiction in the premises.

Decided the same day as the Sixto case was *Union Cab Company*, 110 NLRB No. 259 (December 16, 1954), a proceeding involving several taxicab companies in Anchorage, Alaska. Citing another recent taxicab case³ in which "the Board ruled that it would not assert jurisdiction over taxicab enterprises [in the 48 States]," a Board majority announced its decision "to adhere to that policy with respect to taxicab enterprises located in the Territories, despite the fact that the Act gives the Board plenary jurisdiction over all business enterprises operating in such places."⁴ Member Murdock's dissent restated his position that "the Board is bound to exercise plenary jurisdiction with respect to labor relations in the Territories * * *"

Although one may conjecture regarding the

³H. H. Williams, d/b/a Checker Cab Co., etc., 110 NLRB No. 109.

⁴And also despite the fact that the Board has not entered into an agreement with any Agency of the Territory of Alaska in which the Board has ceded jurisdiction over any cases in any industry to such Territorial Agency, in accordance with Section 10 (a) of the Act. See S. Rept. 105, 80th Cong. 1st Sess., p. 26 (1947); H. Rept. 510, 80th Cong., 1st Sess., p. 52 (1947).

phrase, "specially applicable standards," appearing in the aforementioned Sixto case, I am unable to interpret the Sixto, Virgin Isles Hotel, and Union Cab cases other than as holding that the Board applies in all respects the same jurisdictional tests to the Territories as it does to the States. For the Board has jurisdiction over the all trade and commerce within the Territories and I do not perceive on what basis the Board would apply Tests A, B and C and not Tests D, E and F. I must conclude, therefore, in accordance with the aforementioned cases and Jonesboro Grain Drying Co-operative, 110 NLRB No. 67, that it would not effectuate the policies of the Act to assert jurisdiction in this matter and I shall accordingly recommend that the complaint herein be dismissed.

Order

It is recommended that the complaint in this matter be dismissed.

Dated at Washington, D. C., this 7th day of January, 1955.

/s/ RALPH WINKLER,
Trial Examiner.

Before the National Labor Relations Board
[Title of Cause.]

EXCEPTIONS

Counsel for the General Counsel excepts to the Intermediate Report of the Trial Examiner in the above-entitled matter in the following particulars:

Reference to Intermediate Report

1. Page 3, Lines 23-27—To the finding that the Board applies to territories, in all respects the same jurisdictional standards as apply to the states.

2. Page 3, Lines 30-33—To the conclusion that assertion of jurisdiction on the facts in the instant case would not effectuate the policies of the Act.

3. Page 3, line 37—To the recommendation to dismiss the complaint herein.

No page and line citations are available as this exception is deemed to spring from error in law.

4. To the failure to find that the direct importation by Respondent into the Territory of Alaska of \$71,687.00 worth of supplies represents and constitutes a substantial, close and intimate relation to trade, traffic, transportation and commerce in the Territory of Alaska.

(Tr. page 6, line 23 to page 7, line 1.)

No page and line citations are available as this exception is deemed to spring from error in law.

5. To the failure to find that the gross annual volume of sales by Respondent in the Territory of

Alaska in the amount of \$226,000.00 represents and constitutes a substantial, close and intimate relation to trade, traffic, transportation and commerce in the Territory of Alaska.

(Tr. page 7, lines 6-8.)

No page and line citations are available as this exception is deemed to spring from error in law.

6. To the failure to find that the gross annual volume of business conducted by Respondent in the Territory of Alaska when interrupted by a labor dispute has a pronounced effect and burden upon and obstruction to trade, traffic, transportation and commerce in Alaska.

(Tr. page 11, lines 6-17; page 33, line 11; page 34, line 6; page 86, lines 7-22; page 94, lines 10-14; page 114, lines 6-8; page 116, lines 11-14.)

No page and line citations are available as this exception is deemed to spring from error in law.

7. To the failure to find that the Act empowers the Board to exercise plenary jurisdiction over the business enterprise of Respondent.

Dated at Seattle, Washington, this 25th day of January, 1955.

/s/ PATRICK H. WALKER,
Counsel for the General
Counsel.

United States of America
Before the National Labor Relations Board
Case No. 19-CA-1158

HOMER W. ROBINSON, d/b/a ALASKA BEV-
ERAGE CO.

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL UNION No.
183, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, AFL

DECISION AND ORDER

On January 7, 1955, Trial Examiner Ralph Winkler issued his Intermediate Report in the above-entitled proceeding, finding that it would not effectuate the policies of the Act for the Board to assert jurisdiction in this case, and recommending that the complaint be dismissed in its entirety, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief; the Respondent filed a brief in support of the Intermediate Report.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and

the record in the case, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner with the following modification:

As stated in the Intermediate Report, the Respondent is engaged in the manufacture, sale and distribution of carbonated beverages in Fairbanks, Alaska. During the past year its purchases amounted to approximately \$75,500, of which 95 per cent was obtained from outside the Territory: Respondent's sales during the same period amounted to approximately \$226,000, all of which were made within the Territory.

Since the Intermediate Report was issued in this case, the Board's decision in *Conrado Forestier, d/b/a Canteria Providencia*, 111 NLRB No. 141, has been issued, in which the Board made clear that its jurisdictional standards would be uniformly applied in the Territories as in the several States. Accordingly, as the Respondent's operations fail to meet any of the Board jurisdictional standards,¹ we find, for the reasons stated in *Canteria Providencia*, that it would not effectuate the policies of the Act to assert jurisdiction in this case. We shall, therefore, dismiss the complaint in its entirety.²

¹Jonesboro Grain Drying Co-operative, 110 NLRB No. 67.

²Member Murdock, in signing this decision, directs attention to the fact that he dissented from the adoption of this policy of applying U. S. standards to the Territories in place of the Board's former plenary policy, in the *Canteria Providencia* case.

Order

Upon the record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint issued herein against the Respondent, Homer W. Robinson, d/b/a Alaska Beverage Co., Fairbanks, Alaska, be, and it hereby is, dismissed.

Dated: Washington D. C., March 17, 1955.

[Seal]

GUY FARMER,

Chairman;

ABE MURDOCK,

IVAR H. PETERSON,

PHILIP RAY RODGERS,

Members, National Labor Relations Board.

United States of America
Before the National Labor Relations Board
Case No. 19-CA-1158

In the matter of:

HOMER W. ROBINSON, d/b/a ALASKA BEVERAGE CO.

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL UNION No.
183, AFL

TRANSCRIPT OF PROCEEDINGS

November 22, 1954—10:30 A.M.

The hearing of the above-entitled case was called for hearing at the call of the calendar and the following proceedings were had:

Before: Ralph Winkler, Trial Examiner.

Appearances:

CHARLES Y. LATIMER,
General Counsel.

E. L. ARNELL,
Attorney for Respondent.

MIKE CSEREPES,
ROBERT J. DIXON, and
JOE MORGAN,
For Local 183.

* * *

M. Latimer: I will ask the reporter to mark the formal papers for identification, as General Counsel's Exhibit No. 1-A, charge filed on August 9, 1954, against the Alaska Beverage Company; 1-B is Affidavit of Sevice of charge sworn to August 9, 1954, with registered postal receipts attached showing date of delivery as of August 10, 1954; 1-C, copy of Complaint dated November 4, 1954, signed by Thomas P. Graham, Jr., Regional Director, to which is attached copy of Notice of Hearing sworn to August 9, 1954; 1-D is Affidavit of Service of complaint and notice of hearing sworn to on the 4th day of November, 1954, to which is attached registered postal receipts showing dates of delivery

to the party; 1-E, copy of respondent's answer sworn to November 12, 1954. I have shown the exhibits to counsel and I offer them in evidence.

Trial Examiner: Objection?

Mr. Arnell: No objection.

Trial Examiner: Received.

(The documents above referred to were thereupon received in evidence as Exhibits 1-A through 1-E.) [4*]

Mr. Latimer: I would like to move at this time, Mr. Examiner, to delete from the Complaint paragraphs VIII and IX.

Trial Examiner: May I see the complaint, please. Oh, let me have Exhibit 1.

Mr. Latimer: You want an extra copy of it?

Trial Examiner: All right, sir. Proceed.

Mr. Latimer: Motion granted?

Trial Examiner: I haven't heard your motion.

Mr. Latimer: I moved to delete Paragraphs VII and IX from the complaint.

Trial Examiner: Granted. [5]

* * *

Mr. Latimer: The following stipulation is offered, Mr. Examiner.

(At this time, a discussion was held off the record.)

Mr. Latimer: During the past year respondent made purchases consisting principally of bottles and ground sugar and concentrates amounting to ap-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

proximately \$75,461, ninety-five per cent of which was shipped into the Territory [6] of Alaska from points outside the Territory. During the same period of time, all sales were made locally.

Trial Examiner: Do you have any figure on the sales?

Mr. Latimer: What are the sales?

Mr. Arnell: I thought you got those.

Mr. Latimer: Not the sales. During the same period of time sales amounted to approximately \$226,000, all of which were made locally.

Trial Examiner: All right, the stipulation is good.

Mr. Latimer: I would like to call Mr. Scerepes.

MICHAEL CSEREPES,

a witness called on behalf of and by the General Counsel, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Latimer: [7]

* * *

Q. Do you have a copy of that?

A. Well, first I received a reply by telephone conversation.

Q. Oh. Tell us about that; when was that?

A. That was on the 26th, or not, the telephone conversation was on the 28th of April and Mr. Robinson called. At that time the boys were off work. We went on strike for a couple of days while we were waiting to hear whether he had come back to negotiate and we hadn't received any word so

(Testimony of Michael Cserepes.)

finally on the 28th it was the second day of our strike this phone conversation from Mr. Robinson in New York or Connecticut stating that he had received our telegram late and that he had been in another place and had been unable to receive the telegram but that he would try and get up to Fairbanks about the 15th of May, I believe he said at that time, and that we talked a lot about the fact that we had an election earlier in '53, and that the thing had dragged on for a long time and that we were afraid that we might have to go to another election. I thought so, and he said that he would grant an extension of time to us and he stated that he would send a telegram to confirm our conversation. [11]

* * *

Cross-Examination

By Mr. Arnell: [32]

* * *

Q. Was that before or after the strike that has been referred to? A. That was before.

Q. What did you do then following the second telephone conversation?

A. Well, following the second phone conversation the boys went out on strike, or we went on strike at the plant because—

Q. Was that before or after your wire of April 23rd which has been admitted in evidence as General Counsel's Exhibit No. 2?

A. That was after, because even though we

(Testimony of Michael Cserepes.)

sent the wire, said we would go out on the 26th, also thought that we would give him another day, if we at least received word he would be here at some particular date. That is all we wanted, just the fact that he would get here on the 26th so we would know.

Q. Not having heard from him by the 26th, the men walked out; is that correct?

A. No, the men walked out on the 27th, but decided we would [33] give him a chance to contact us again. I got ahold of Mr. Cohoe and asked if he had gotten ahold of him. Mr. Cohoe stated he heard from Mr. Robinson, said he had been here and he wouldn't say when. He said he wouldn't try to get ahold of him again, that we would have to wait until he got here. [34]

* * *

ROBERT J. DIXON,

a witness called on behalf of and by the Respondent, after having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Arnell: [80]

* * *

Q. Well, Mr. Dixon, after the men went out on strike, did you receive any communication from Mr. Robinson that he would be in town at any particular time?

A. After that one particular night that Mr. Cohoe placed a call through I have never talked to

(Testimony of Robert J. Dixon.)

Mr. Robinson from that time until he came in Fairbanks here today that I saw him this afternoon.

Q. Well, did you personally make any attempt to communicate with him by letter or otherwise?

A. None whatsoever due to the fact that I left the negotiations up to Mike who had originally started it, Mike Scerepes.

Q. Mr. Dixon, after the men went out on strike, what course did your Union pursue to make the strike effective?

A. Well, the pickets were on the, immediately put on the following Monday morning after the, I believe it was on the morning of the 28th. [86]

* * *

Cross-Examination

By Mr. Latimer:

Q. Mr. Ing is still handling Alaska Beverage products, is he not?

A. As far as I know he still is.

Q. When you would get these telephone calls from the owners of shops and liquor stores and cafes and things, what was the nature of the conversation?

A. Well, they asked is the strike still on at the Coca-Cola and I say yes, they is pickets up there on duty.

Q. Now, when you talked to Mr. Robinson on the telephone in the early part of June or the latter part of June rather, just before this strike was called, was there anything said to Mr. Robinson about trying to negotiate by mail?

(Testimony of Robert J. Dixon.)

A. He wanted me to write him a letter and state in a letter what we wanted and also wanted me to send him the contracts, one of the hourly scale and one of the monthly scale. [94]

* * *

H. W. ROBINSON,

the respondent, was called as a witness by and for himself, and having been previously sworn, was examined and testified further as follows:

Direct Examination

By Mr. Arnell: [97]

* * *

Q. Following your departure from Alaska on or about June 16th or 17th, what communications, if any, did you receive from Mr. Scerepes or anyone else representing the Union?

A. I received a telegram from Mr. Scerepes dated June 22nd, stating that the men were going to go on strike unless there was a contract signed prior to June 26th, on a monthly basis. I called Mr. Scerepes on the phone and told him that I had never received a contract on a monthly basis for consideration and didn't know how the Union would change Article 14, if a monthly basis were to be used, and he said that the men were worried about having their wages cut because the month's trial period was about to be over and suggested that I wire him agreeing to keep that monthly plan into effect until a contract was signed and I said I would agree to give them a month's notice before I

(Testimony of H. W. Robinson.)

would ever change the wage plan. And so sire him, which I did and also suggested that he send me the monthly contract he wanted me to sign. [114]

* * *

Q. What was the subject matter of your conversation then as you recall?

A. I believe the day I talked to Mr. Dixon the men were on strike and I begged Mr. Dixon to send me a contract, monthly basis that I could sign so that the men could go back to work. [116]

* * *

In the United States Court of Appeals
For the Ninth Circuit
No. 14779

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL UNION
No. 183, INTERNATIONAL BROTHER-
HOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF
AMERICA, AFL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board by Its
Executive Secretary, duly authorized by Section

102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, entitled, “Homer W. Robinson d/b/a Alaska Beverage Co. and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 183, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL,” Case No. 19-CA-1158, before said Board, such transcript including the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Order designating Ralph Winkler Trial Examiner for the National Labor Relations Board, dated November 22, 1954.

2. Stenographic transcript of testimony taken before Trial Examiner Winkler on November 22, 1954, together with all exhibits introduced in evidence.

3. Copy of Trial Examiner Winkler’s Intermediate Report and Recommended Order (annexed to item 5 hereof); and Order transferring case to the Board, both dated January 7, 1955, together with affidavit of service and United States Post Office return receipts thereof.

4. Copy of General Counsel's Exceptions to the Intermediate Report received January 27, 1955.

5. Copy of Decision and Order issued by the National Labor Relations Board on March 17, 1955, with Intermediate Report and Recommended Order annexed, together with Affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 28th day of June, 1955.

[Seal] /s/ FRANK M. KLEILER,

Executive Secretary, National
Labor Relations Board.

[Endorsed]: No. 14779. United States Court of Appeals for the Ninth Circuit. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 183, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Petitioner, vs. National Labor Relations Board, Respondent, Transcript of Record. Petition to Review and Set Aside an Order of the National Labor Relations Board.

Filed June 30, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 14779

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL UNION No.
183, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, AFL,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW OF ORDER OF
NATIONAL LABOR RELATIONS BOARD

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

Teamsters, Chauffers, Warehousemen and Help-
ers, Local Union No. 183, International Brother-
hood of Teamsters, Chauffeurs, Warehousemen and
Helpers of America, AFL, pursuant to Section 10,
Subdivision (f) of the National Labor Relations
Act, as amended, 29 U. S. C. § 160 (f), respect-
fully petition this Court for review of the decision
and order of the National Labor Relations Board,
entered March 17, 1955, dismissing the complaint
issued herein against Homer W. Robinson d/b/a
Alaska Beverage Co. The proceedings resulting in

this order are known in the records of the National Labor Relations Board as Case No. 19-CA-1158.

In support of this petition Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 183, respectively show:

1.) Homer W. Robinson, d/b/a Alaska Beverage Co., is engaged in business in the Territory of Alaska and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 183, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, is a labor organization engaged in promoting and protecting the interest of its members in the Territory of Alaska, within this judicial circuit where the unfair labor practice occurred. This Court, therefore, has jurisdiction of this petition by virtue of Section 10 (f) of the National Labor Relations Act, as amended.

2.) In the proceedings in Case No. 19-CA-1158, a complaint dated November 4, 1954, was issued by the General Counsel against Homer W. Robinson, d/b/a Alaska Beverage Co., charging said Homer W. Robinson, d/b/a Alaska Beverage Co., with unfair labor practices. A hearing was held before a Trial Examiner of the National Labor Relations Board on November 22 and 23, 1954. On March 17, 1955, the National Labor Relations Board duly issued its decision and order dismissing the said complaint upon the ground that said Homer W. Robinson, d/b/a Alaska Beverage Co., did not do

a sufficient volume of business to meet the National Labor Relations Board self-imposed jurisdictional standards or tests. This decision and order of the National Labor Relations Board is based upon a misconception of law, because Homer W. Robinson, d/b/a Alaska Beverage Co., engaged and engages in commerce within the Territory of Alaska and the National Labor Relations Board ignored such commerce for the purpose of determining whether it should exercise jurisdiction, and considered only commerce between points within the Territory of Alaska and points outside the Territory of Alaska. It found commerce of the latter type insufficient to justify exercise of its jurisdiction under its own self-imposed standards, and altogether failed and refused to consider the commerce of Homer W. Robinson, d/b/a Alaska Beverage Co., within the Territory of Alaska in reaching its said decision as to jurisdiction, contrary to Section 2, Subsection 6, of the National Labor Relations Act, as amended.

Wherefore, Teamsters, Chauffeurs, Warehousemen and helpers, Local Union No. 183, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, prays this Honorable Court that it require the National Labor Relations Board to certify and deliver to this Court a transcript of the entire record in this proceeding, including the pleadings and testimony and exhibits upon which said decision and order of March 17, 1955, was entered and the findings and order of the Board, and that this Court take juris-

diction of this proceeding and enter a decree remanding this cause to the National Labor Relations Board and the Trial Examiner with instructions to determine the issues presented on the merits.

Respectively submitted,

/s/ SAMUEL B. BASSETT,

BASSETT, GEISNESS &
VANCE,

Attorneys for Petitioner.

[Endorsed]: Filed May 28, 1955.

[Title of Court of Appeals and Cause.]

ANSWER OF THE NATIONAL LABOR RE-
LATIONS BOARD TO THE PETITION TO
REVIEW AND SET ASIDE ITS ORDER
DISMISSING COMPLAINT

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, Pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 et seq.), hereinafter called the Act, files this answer to the petition to review and set aside an order of the Board dismissing the complaint of unfair labor practices issued against Homer W. Robinson, d/b/a Alaska Beverage Co., Pursuant to a charge filed by Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 183, International Brotherhood of Team-

sters, Chauffeurs, Warehousemen and Helpers of America, AFL, petitioner herein.

1. Answering the allegations contained in paragraph 1 of the petition to review, the Board admits that this Court has jurisdiction under Section 10 (f) of the Act inasmuch as Homer W. Robinson, d/b/a Alaska Beverage Co., is engaged in business within this judicial circuit, that petitioner resides and transacts business within this judicial circuit, and that the unfair labor practices are alleged to have occurred within this judicial circuit. The Board, having dismissed the complaint on jurisdictional grounds, did not pass on the question whether any unfair labor practices occurred.

2. With respect to the allegations contained in paragraph 2 of the petition, the Board prays reference to the certified transcript of the record, filed herewith, of the proceedings before it, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of law, and order of the Board, and all other proceedings had in this matter before the Board.

3. Further answering, the Board denies each and every allegation of error contained in paragraph 3 of the petition to review, and avers that the proceedings designated on the records of the Board as Case No. 19-CA-1158, entitled "Homer W. Robinson, d/b/a Alaska Beverage Co., and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 183, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL," were and are in all respects valid and proper, and that there is no

ground for granting the requested relief by remanding the case to the Board and the Trial Examiner for a determination of the merits of the alleged unfair labor practices.

4. Pursuant to Section 10 (f) of the Act, the Board has certified and filed with the Court a transcript of the entire record in the proceedings before it.

Wherefore, the Board prays that the Court enter a decree denying the petition to review and set aside the order of the Board dismissing the complaint.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board.

Dated at Washington D. C., this 28 day of June, 1955.

[Endorsed]: Filed June 30, 1955.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
PETITIONER INTENDS TO RELY

In this proceeding Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 183, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, will urge and rely upon the following points:

1.) Under Section 2, Subsection (6) of the National Labor Relations Act, as amended, the National Labor Relations Board was required to assert jurisdiction regardless of its own self-imposed jurisdictional standards or tests.

2.) In making its determination as to whether it should assert jurisdiction the National Labor relations Board was required, under Section 2, Subsection (6) of the National Labor Relations Act, as amended, to consider the effect upon commerce within the Territory of Alaska of unfair labor practices charged against the respondent employer, and its refusal to assert jurisdiction was based upon a misconception of law, because it refused to consider the effect of those practices upon such commerce.

/s/ SAMUEL B. BASSETT,

BASSETT, GEISNESS &
VANCE.

Attorneys for Petitioner.

[Endorsed]: Filed July 13, 1955.

United States Court of Appeals

For the Ninth Circuit

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS,
LOCAL UNION No. 183, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL, *Petitioner,*
vs.
NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER

BASSETT, GEISNESS & VANCE
SAMUEL B. BASSETT
Attorneys for Petitioner.
811 New World Life Building,
Seattle 4, Washington.

Of Counsel:
GEORGE H. DAVIES



FILED

JUL 11 1951

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United States Court of Appeals
For the Ninth Circuit

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS,
LOCAL UNION No. 183, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL, *Petitioner,*
vs.
NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER

BASSETT, GEISNESS & VANCE
SAMUEL B. BASSETT
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Seattle 4, Washington.

Of Counsel:
GEORGE H. DAVIES



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STATUTES

National Labor Relations Act, as amended,	
29 U.S.C. §160(f)	1
§2(6)	3, 4, 5, 6, 9, 15, 17
§2(7)	2, 5, 6
§8(a)(1) and (5)	2
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United States Court of Appeals

For the Ninth Circuit

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
& HELPERS, LOCAL UNION No. 183, IN-
TERNATIONAL BROTHERHOOD OF TEAM-
STERS, CHAUFFEURS, WAREHOUSEMEN &
HELPERS OF AMERICA, AFL, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 14779

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF OF PETITIONER

JURISDICTION

This petition was filed pursuant to Section 10 (f) of the National Labor Relations Act, as amended, 29 U.S.C., Section 160 (f) (hereinafter called the Act), to review and set aside an order of the National Labor Relations Board.

Homer W. Robinson, d/b/a Alaska Beverage Co. (hereinafter called the Employer) is engaged in business in the Territory of Alaska, and Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union No. 183, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL, is a labor organization engaged in promoting and protecting the interests of its members in the Territory of Alaska

within this judicial circuit, where the unfair labor practice occurred. This court, therefore, has jurisdiction of this petition by virtue of Section 10 (f) of the Act.

STATEMENT OF THE CASE

Petitioner is a labor organization engaged in promoting and protecting the interests of its members in the Territory of Alaska. On August 9, 1954, it filed a charge with the National Labor Relations Board (hereinafter called the Board) in which it alleged that the Employer was guilty of an unfair labor practice in violation of Sections 8 (a) (1) and (5) of the Act, in that the Employer had refused to bargain collectively with the petitioner. The petitioner had won a representation election at the Employer's plant on May 26, 1953, conducted pursuant to Section 9 (a) of the Act, and was thereafter duly certified as the collective bargaining representative of the employees of the Employer at his plant at Fairbanks, Alaska (R. 8, 12).

On the 4th day of November, 1954, the Regional Director for the 19th Region issued his complaint charging the Employer with an unfair labor practice in violation of Sections 8 (a) (1) and (5) of the Act (R. 6-10). The Employer filed his answer, admitting that he was engaged in commerce within the meaning of Section 2 (6), but denying that he was engaged in commerce within the meaning of Section 2 (7) of the Act (R. 11). A hearing was held before a trial examiner, on November 22, 1954 (R. 29). At the hearing it was stipulated that the Employer during the past year had made purchases consisting principally of bottles, ground sugar and concentrates in the sum of approxi-

mately \$75,461.00, 95% of which was shipped into the Territory of Alaska from points outside the Territory, and during the same period the Employer made sales locally in the sum of approximately \$226,000.00 (R. 30-31).

On January 7, 1955, the trial examiner issued his intermediate report and recommended order, recommending that the complaint be dismissed for the reason that the Employer's annual volume of business did not meet the Board's self-imposed jurisdictional standards (R. 17-23). Exceptions to the intermediate report and recommended order were filed by General Counsel of the Board (R. 24-25). On March 17, 1955, the Board issued its order adopting the intermediate report and recommended order of the trial examiner, and, accordingly, dismissed the complaint in its entirety (R. 26-28).

Since both the trial examiner and the Board ruled that the complaint should be dismissed, no decision was made at either stage on the merits of the unfair labor practice charge.

STATEMENT OF POINTS

I.

Under Section 2 (6) of the Act, the Board was required to assert jurisdiction regardless of its self-imposed jurisdictional standards applied to the 48 states.

II.

In making its determination as to whether it should assert jurisdiction, the Board was required, under Section 2 (6) of the Act to consider the effect on commerce

within the Territory of Alaska of the unfair labor practice charge against the Employer, and its refusal to assert jurisdiction was based upon a misconception of law, because it refused to consider the effect of unfair labor practices in commerce, *within* the Territory.

SUMMARY OF ARGUMENT

It is the petitioner's contention that Section 2 (6) of the Act, defining the term "commerce," sets the standard for the exercise of the Board's jurisdiction *within* the territories, and that the Board ignored the language of that definition. Section 2 (6) of the Act provides:

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or *within* the District of Columbia or *any Territory*, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country." (Emphasis supplied)

The italicized words of Section 2 (6) clearly require that the Board shall consider the volume of commerce *within* the Territory of Alaska. The trial examiner and the Board ignored the words "*within* any Territory," and applied to the Territory the same self-imposed jurisdictional standards for the assertion of jurisdiction with respect to commerce "among the several States."

ARGUMENT

I. Statutes Involved

There are only three sections of the Act which have any bearing on the question presented:

Section 2 (6):

“The term ‘commerce’ means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or *within* the District of Columbia or *any Territory*, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.” (Emphasis supplied)

Section 2 (7):

“The term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.”

Section 10 (a):

“The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry * * * even though such cases may involve labor disputes affecting

commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

While Section 10 (a) of the Act says the Board is "empowered" to prevent unfair labor practices "affecting commerce," what constitutes an unfair labor practice "affecting commerce" must be determined by reference to the definition of the terms "commerce" in Section 2 (6) and "affecting commerce" in Section 2 (7).

It should be noted here that the definitions of the terms "commerce" and "affecting commerce" were not changed by the amendatory act of 1947. However, when the National Labor Relations Act was amended in 1947, there was added to Section 10 (a) a proviso authorizing the Board, under certain circumstances, to cede its jurisdiction to an agency established in any State or Territory.

The Supreme Court has held in the following cases that the Act was intended to encompass the full reach of the commerce power of Congress:

Polish National Alliance of the United States of America v. NLRB, 322 U.S. 643, 88 L.Ed. 1509, 64 S.Ct. 1196;

NLRB v. Fainblatt, 306 U.S. 601, 83 L.Ed. 1014, 50 S.Ct. 668;

NLRB v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 81 L.Ed. 893, 57 S.Ct. 615;

Consolidated Edison Company of New York, Inc., v. NLRB, 305 U.S. 197, 83 L.Ed. 126, 59 S.Ct. 206.

II. The Board Has Read Out of the Act the Word "Within" in Section 2(6)

In 1954, with a change of administration, the National Labor Relations Board announced a new set of jurisdictional standards to be applied in determining the question of whether the Board would assert jurisdiction in a particular case. These new standards were enunciated by the Board in *Jonesboro Grain Drying Cooperative*, 110 NLRB No. 67, 35 LRRM 1038. In that case, the Board said:

"Accordingly, we have determined that in future cases the Board will assert jurisdiction over enterprises which annually meet one or more of the following standards:

"(1) *Direct inflow standard*: An enterprise which receives goods or materials from *out of State*, valued at \$500,00 or more.

"(2) *Direct outflow standard*: An enterprise which produces or handles goods and ships such goods *out of State*, or performs services *outside the State* in which the enterprise is located, valued at \$50,000 or more.

"(3) *Indirect inflow standard*: An enterprise which receives goods or materials from other enterprises in the same State which those other enterprises receive from *out of State*, valued at \$1,000,000 or more.

"(4) *Indirect outflow standard*: An enterprise which furnishes goods or services to other enterprises coming within sub-paragraph (2) above, or to public utilities or transit systems, or instrumen-

talities or channels of commerce and their essential links, which meet the jurisdictional standards established for such enterprises; and (a) such goods or services are directly utilized in the products, services, or processes of such enterprises and are valued at \$100,000 or more; or (b) such goods or services, regardless of their use, are valued at \$200,000 or more.

“(5) *Multistate standard*: An establishment other than retail which is operated as an integral part of a multi-state enterprise, and (a) the particular establishment involved meets any of the foregoing standards; (b) the direct outflow of the entire enterprise amounts to \$250,000 or more; or (c) the indirect outflow of the entire enterprise amounts to \$1,000,000 or more.

“We have further determined that unless an employer’s volume of operations meets one of the Board’s new independent jurisdictional standards, we will not accumulate those standards in order to assert jurisdiction.” (Emphasis in part supplied)

Although in none of the above five standards is there any mention of commerce “*within*” the District of Columbia or Territories, the trial examiner and Board relied on these standards to decline jurisdiction (R. 23, 27). In its decision the Board said:

“Since the Intermediate Report was issued in this case, the Board’s decision in *Conrado Forester, d/b/a Canteria Providencia*, 111 N.L.R.B. No. 141, has been issued, in which *the Board made clear that its jurisdictional standards would be uniformly applied in the Territories as in the several States. Accordingly, as the Respondent’s operations fail to meet any of the Board jurisdictional standards,*¹ we find, for the reasons stated in *Can-*

teria Providencia, that it would not effectuate the policies of the Act to assert jurisdiction in this case. We shall, therefore, dismiss the complaint in its entirety." (Emphasis supplied) (R. 27)

As its sole authority, footnote 1, the Board cited *Jonesboro Grain Drying Cooperative*, 110 NLRB No. 67, *supra* (R. 27).

The Board in deciding whether to assert jurisdiction in the case at bar was required by the Act to consider and give meaning to the word "*within*" in Section 2 (6). This the Board failed to do. It considered only the flow of commerce "between" the Territory of Alaska and other States or Territories. This clearly was error. In establishing jurisdictional standards for the Territories the Board must consider, at least, the location, size and economic and industrial development of the Territories and adopt standards to be applied with respect to "trade" or "commerce" "*within*" the Territories.

Congress does not have constitutional authority to regulate intra-state commerce but it does have plenary power to regulate commerce "within * * * any Territory," and it has clearly indicated its intention to exercise that authority to its fullest extent (Section 2 (6) of the Act). It is, therefore, incumbent upon the Board to give effect to the congressional intent when establishing jurisdictional standards for the Territories, and its refusal so to do is pure abdication of authority vested in the Board by the Act.

Prior to the recent change of administration and personnel of the Board, the Board had asserted plenary jurisdiction in the Territories. In *Panaderia Sucesion*

Alonso, 87 NLRB 877, 25 LRRM 1146, the Board asserted jurisdiction over a bakery in Puerto Rico which employed only three production workers, and during the year made purchases from the United States which totalled approximately \$7,800.00. All of the products of the bakery were sold locally. Asserting jurisdiction, the Board said:

“It may well be true, as the Trial Examiner suggests, that were the Respondents’ bakery located in one of the 48 States, we would dismiss this proceeding on the ground that the business involved is so small and local in nature that an interruption of its operations by a labor dispute would have only a remote and insubstantial effect on commerce. However, the term ‘commerce’ when applied to Puerto Rico has a broader meaning than when applied to any of the States. By statutory definition, all trade *within* any Territory is embraced by the term ‘commerce,’ whereas with respect to a State, only trade between such State and outside points is embraced by that term. *In consequence, the Board has plenary jurisdiction over all business enterprises within Puerto Rico.*” (Emphasis partly supplied)

The question of exercising plenary jurisdiction in the Territories was before the First Circuit in *National Labor Relations Board v. Gonzales Padin Co.*, 161 F. (2d) 353 (1947). The court there said:

“It is established by several decisions of the Supreme Court and this Circuit Court of Appeals that Puerto Rico is a completely organized territory, although not one incorporated into the United States, and that as such the power of Congress to legislate respecting it is plenary, subject only to

such constitutional restrictions as apply to the situation, none of which concern us here. See *Cases v. United States*, 1 Cir., 131 Fed.(2d) 916, 919, 920, and the cases cited therein. Thus Congress can constitutionally regulate purely intra-territorial commerce. And we think there can be no doubt that Congress must have intended to exercise this power when in Section 10 (a) of the National Labor Relations Act it gave the Board authority to prevent any person from engaging in any unfair labor practice affecting commerce, and in Section 2 (6) of the Act defined commerce to include 'trade * * * within * * * any Territory.' That is to say, we think Congress in the National Labor Relations Act intended to deal comprehensively with labor disputes affecting commerce. (See *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 607, 59 S.Ct. 668, 83 L.Ed. 1014) just as in the Sherman Anti-Trust Act of 1890, 15 U.S.C.A. Secs. 1-7, 15 note, as supplemented by the Clayton Act of 1914, 38 Stat. 730, it intended to deal comprehensively with contracts, combinations and conspiracies in restraint of trade. (*Puerto Rico v. Shell Co.*, 302 U.S. 253, 259, 58 S.Ct. 167, 82 L.Ed. 235) and to that end exercised all the power it possessed in the premises."

The Board until 1954, in numerous cases, exercised plenary jurisdiction over enterprises in the Territories. In that year in *Virgin Isles Hotel, Inc.*, 110 NLRB 558, 35 LRRM 1068, the Board, for the first time, refused to exercise plenary jurisdiction in the Territories. In that case the Board refused to assert jurisdiction over a hotel located on St. Thomas Island in the Virgin Islands, relying on its established policy of declining jurisdiction over the hotel industry in the 48 States.

Member Murdock, in a well-reasoned dissenting opinion, pointed out that the Board, recognizing that the term "commerce" when applied to the Territories had a broader meaning than when applied to the States, had previously exercised its plenary jurisdiction in the Territories, without regard to the size, type or volume of business of the enterprise involved; and that in declining jurisdiction it was refusing to perform its statutory duties. Member Murdock said:

"Apart from its specific effect upon hotels in the Territories, and the District of Columbia, the instant decision indicates a marked rescission of the Board's plenary jurisdiction in these areas. The Board has previously exercised such plenary jurisdiction, for well-founded reasons, without regard to the size, type, or volume of business of the enterprise involved. The majority opinion, in this case, accordingly, constitutes a major alteration in this Agency's jurisdictional policy comparable to those affecting the continental United States (except for the District of Columbia) upon which I have commented generally in my dissenting opinion in *Breeding Transfer Company*, 110 NLRB 493. As was true of the new standards of jurisdiction discussed in the *Breeding* case, this change is similarly inconsistent with the Act and the responsibilities which it imposes on this Agency, involving a determination to withhold protection of the Act which properly should be made to Congress.

"The Board exercise of jurisdiction over enterprises in the Territories and the District of Columbia is specifically directed in a statute which the Board administers. As the courts have previously pointed out,

" * * * Congress can constitutionally regulate

purely intra-territorial commerce. And we think there can be no doubt that Congress must have intended to exercise this power when in Section 10 (a) of the National Labor Relations Act it gave the Board authority to prevent any person from engaging in any unfair labor practice affecting commerce, and in Section 2 (6) of the Act defined commerce to include “*trade * * * within * * * any Territory*’.” (Emphasis supplied)

“The Board has previously observed that, by this statutory definition ‘*all trade within any Territory* is embraced by the term “commerce,” whereas with respect to a State, only trade between such State and outside points is embraced by that term.’ [Emphasis, in part, supplied.] It is thus clear that the statement of the majority decision in this case that ‘the relationship to commerce is no greater here than in the case of a hotel operating in any of the 48 States’ is contrary to the explicit terms of the Act which define commerce differently with respect to Territories and the District of Columbia.

“The concurring opinion also fails to recognize the fact that ‘commerce’ is differently defined with respect to Territories. The operations of this or any other employer in a Territory or the District of Columbia will obviously have a greater effect upon all trade within that area than the operations of a similar establishment in the States would have upon commerce between and among the States.”

Since the *Virgin Isles Hotel* case the Board:

(1) Refused to assert jurisdiction over a retail pastry and food business in Puerto Rico where the enterprise did not meet its jurisdictional standard for retail enter-

prises in the 48 States. *Sirto Ortega*, 110 NLRB No. 251, 35 LRRM 1345.

(2) Refused to assert jurisdiction over the taxicab industry in the Territory of Alaska for the same reason it had declined jurisdiction over that industry in the 48 States. *Union Cab Co.*, 110 NLRB No. 259, 35 LRRM 1346.

(3) Refused to assert jurisdiction over a radio station in Puerto Rico because its annual income was below \$200,000.00, the minimum jurisdictional standard established in the 48 states. *South P. R. Broadcasting Corporation*, 111 NLRB No. 45, 35 LRRM 1457.

(4) Refused to assert jurisdiction over a stone quarry in Puerto Rico, *Canteria Providencia*, 111 NLRB No. 141, 35 LRRM 1596, for the following reasons:

“There is no question that the Employer’s operations fail to meet any of the standards recently decided by the Board as necessary for the assertion of jurisdiction. The sole issue stems from the fact that the Employer’s business is located in a Territory of the United States. Since the promulgation of the new jurisdictional standards, *the Board has held where specially applicable rules have been established, similar enterprises situated in the Territories are required to conform to the same jurisdictional criteria as are applicable in the 48 states.* In those earlier cases, the Board indicated that no exception as to the Territories was warranted: that the impact on commerce of business operations having their situs in the Territories is no greater than that of similar enterprises located in the 48 states. We believe that the same principle has application here. *Accordingly, in the present case and*

in future cases, the Board's entire jurisdictional standards will be uniformly applied in the Territories as in the several States." (Emphasis supplied)

(5) Refused to assert jurisdiction over another radio station in Puerto Rico for the reason that the employer's gross annual business of \$80,000.00 did not meet the \$200,000.00 annual gross income requirement for radio stations in the 48 states. *W. P. R. A., Inc.*, 111 NLRB No. 186, 35 LRRM 1652.

Despite the fact that the statutory definition of the term "commerce" in Section 2 (6) is identical with reference to the District of Columbia and the Territories the Board, nevertheless, has seen fit to apply to enterprises in the District of Columbia different jurisdictional standards than in the Territories in dealing with identical industries. Indeed, with respect to enterprises within the District of Columbia the Board has disregarded the size, type or volume of the business or enterprise involved. This, we believe, clearly demonstrates that the Board has consciously and arbitrarily disregarded the statutory definition of the term commerce "*within the District of Columbia or any Territory*" (Section 2 (6)).

In *Ginn & Co.*, 114 NLRB No. 25, 36 LRRM 1517, the Board asserted jurisdiction over an employer operating a warehouse and two stores in the District of Columbia and one store in the State of Virginia, although the employer's volume of business did not meet the Board's jurisdictional standard for the 48 States, relying on its plenary jurisdiction within the District of Columbia.

In *National Truck Rental Co.*, 114 NLRB No. 26, 36 LRRM 1521, the Board asserted jurisdiction over an employer engaged in renting passenger cars and trucks in the District of Columbia although its volume of business did not meet the Board's minimum jurisdictional standard in the 48 States, again relying on its plenary jurisdiction.

In *Curtis-Bros., Inc.*, 114 NLRB No. 27, 36 LRRM 1530, the Board asserted its plenary jurisdiction over a company engaged in rug cleaning and in selling, moving and storing furniture within the District of Columbia.

In *Carlyle Hotel of Washington, Inc.*, 36 LRRM 1542, and *Dodge Hotel Co.*, 36 LRRM 1542, the Board asserted its plenary jurisdiction over the hotel industry in the District of Columbia, despite the fact that it had consistently declined jurisdiction over that industry both in the territories and in the 48 States. See: *Virgin Isles Hotel, Inc.*, 110 NLRB 558, 35 LRRM 1068, *supra*.

The Board found that the Employer "is engaged in the manufacture, sale and distribution of carbonated beverages in Fairbanks, Alaska" (R. 27). Concerning the annual dollar volume of its operations the Board further found:

"During the past year its [Employer's] purchases amounted to approximately \$70,500 of which 95% was obtained from outside the Territory; Respondent's sales during the same period amounted to approximately \$226,000, all of which were made within the Territory." (R. 27) (Emphasis supplied)

Dismissing the complaint, the Board said that "its

jurisdictional standards would be uniformly applied to the Territories as in the several States" (R. 27). And finding that the Employer's operations "failed to meet *any* of the Board's jurisdictional standards" established for the States in *Jonesboro Grain Drying Co-Operative*, 110 NLRB No. 67, 35 LRRM 1038, dismissed the complaint in its entirety. We have carefully examined those standards and find none based upon an employer's gross dollar volume sales within a state. This omission is, no doubt, attributable to the fact that Congress does not have the constitutional authority to regulate intra-state commerce. Congress, however, does have the authority to regulate intra-territorial trade or commerce and has exercised that authority by its definition of the term "commerce," as applied to the Territories in Section 2 (6) of the Act.

While the Board is undoubtedly authorized to establish appropriate jurisdictional standards for the Territories based upon the volume of business transacted or sales made *within* the Territories it has not exercised that authority but, instead, has applied jurisdictional standards established for the 48 States, none of which fits the commerce here involved. As a result, trade and commerce within the Territories will be wholly unregulated and both labor and management will be unprotected from unfair labor practices.

While Board Member Murdock signed the Decision and Order of the Board he was careful to direct attention to the fact that, in *Canteria Providencia* (111 NLRB No. 141, 35 LRRM 1596) "he dissented from the adoption of this policy of applying U. S. standards to the Territories in place of the Board's former ple-

nary policy" (R. 27). In his dissent in that case Member Murdock stated, in forceful and convincing terms, the cogent reasons against abandoning the plenary jurisdiction which the Board had asserted in its prior territorial decisions. That statement is more convincing than any argument we can present. We, therefore, take the liberty of quoting from it:

"A further important consideration is the fact that the cutting of the Board's plenary jurisdiction will mean an absence of any regulation or control of industrial disputes in these excised areas in the territories. In the stringent U. S. industry standards, like the \$3,000,000.00 gross receipts test for utilities and local transit systems, may well exclude enterprises which are of great importance to the economy of the territories whose cities may not be large enough to have utilities meeting the U. S. standards. To my knowledge, neither Alaska nor Hawaii has any administrative machinery to do this work. Moreover, although there is an insular board in Puerto Rico, our own decisions have previously pointed out that under judicial decisions, even where such machinery is set up, local authorities are powerless to act even in cases where the Board declines jurisdiction * * *. In other words, the majority's action can only constitute a contribution to chaos in the areas now excised from the Board's jurisdiction in the territories, whether or not it is motivated by desire to withdraw in favor of local authorities. If it is so motivated, the withdrawal is subject to the additional objection that it is a circumvention of the cession requirements of Section 10 (a) of the Act * * *."

The Board's policy of applying U. S. jurisdictional standards to the Territories is, we submit, arbitrary and

unreasonable. That the Board has not hesitated to make arbitrary and unreasonable "jurisdictional standards" is demonstrated, as we have shown above, by the fact that, in the hotel industry, it has asserted jurisdiction in the District of Columbia and at the same time declined jurisdiction in the 48 States and the Territories.

CONCLUSION

For all the foregoing reasons this case should be remanded to the National Labor Relations Board for further proceedings pursuant to a proper exercise of its plenary jurisdiction in the Territories.

Respectfully submitted,

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January, 1956

No. 14779

**In the United States Court of Appeals
for the Ninth Circuit**

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 183, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

**ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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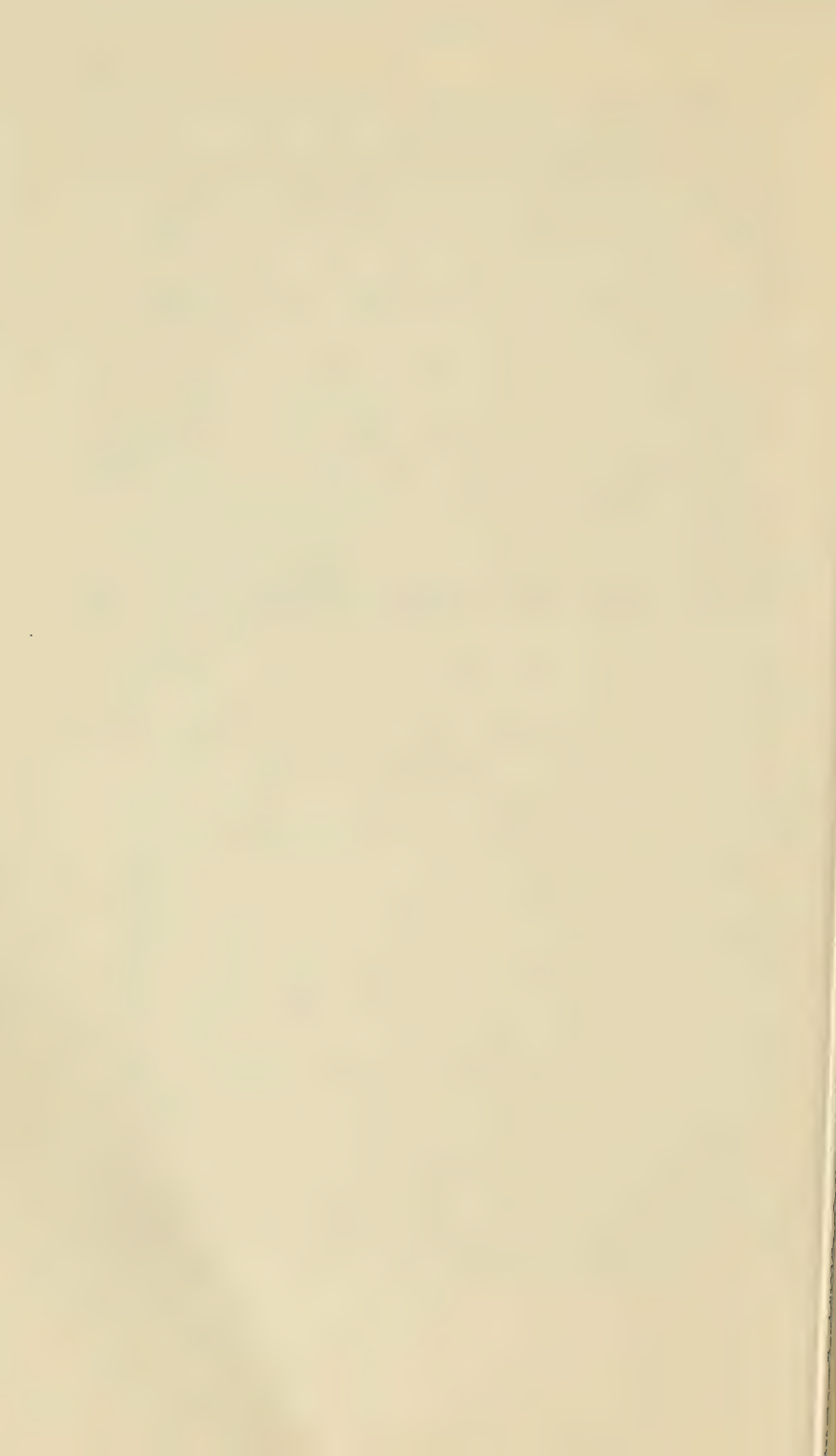
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TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL UNION No. 183, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

*ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 183, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL (hereinafter referred to as the Union) to review the decision and order of the National Labor Relations Board (R. 26-28)¹ dismissing

¹ References to portions of the printed record are designated "R." Wherever, in a series of references, a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

a complaint issued against Homer W. Robinson d/b/a Alaska Beverage Co., pursuant to a charge filed by petitioner under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*),² herein referred to as the Act. This Court has jurisdiction under Section 10 (f) of the Act, inasmuch as the Company's place of business is in, and the unfair labor practices allegedly occurred at, Fairbanks, Alaska, within this judicial circuit. The Board's decision and order is reported at 111 N. L. R. B. 995.

COUNTERSTATEMENT OF THE CASE

Pursuant to a charge filed by the Union, the General Counsel caused a complaint to be issued alleging, *inter alia*, that the Company violated Section 8 (a) (5) and (1) of the Act by refusing to bargain collectively in good faith with the Union as the exclusive representative of the Company's employees. Thereafter, following the usual proceedings, the Board, without determining the merits of the unfair labor practice charged, dismissed the complaint on the grounds that the Company's operations, although within the Board's jurisdiction, did not have a sufficiently significant impact upon interstate commerce to meet the standards established by the Board for asserting its jurisdiction. The proceedings, which relate to the propriety of the Board's dismissal of the complaint, may be briefly summarized as follows:

² The pertinent statutory provisions are reprinted as an Appendix, *infra*, pp. 25-32.

I. The Board's findings of fact

A. Background

In June 1953, following an election conducted by the Board among the Company's employees, the Union was certified as the exclusive bargaining agent of the employees working at the Company's plant in Fairbanks, Alaska, excluding all supervisory employees (R. 18-19; 7, 8, 12). Thereafter, pursuant to a charge filed by the Union against the Company, the Regional Director issued a complaint alleging, *inter alia*, that since about April 23, 1954, the Company had refused to bargain with the Union as the collective bargaining representative of the employees (R. 17-18; 3-10, 29-30). Answering the complaint, the Company denied the commission of the unfair labor practices, asserted that it had bargained and was ready to bargain in good faith at all times material to the complaint and, as an affirmative defense, alleged that the Union was guilty of various unfair labor practices (R. 18; 11-17). The case was scheduled for hearing, and a full hearing was had upon the complaint before a Trial Examiner (R. 18).

B. The business operations of the Company

The undisputed facts relating to the business operations of the Company, as shown by the pleadings and the evidence adduced at the hearing, are as follows: Alaska Beverage Co., a copartnership of which Homer W. Robinson is the sole active partner, maintains its office and principal place of business in Fairbanks, within the Territory of Alaska (R. 18, 27; 7, 11). In the course of its business of manufacturing, selling,

and distributing carbonated beverages, most of the Company's purchases, consisting largely of sugar and concentrates, come from sources located outside the Territory of Alaska (R. 18, 27; 30-31). All of the Company's sales are made locally within the Territory (R. 18, 27; 31). On an annual basis, the Company's purchases amount to approximately \$75,461, 95 percent of which (or \$71,688) are of goods shipped into the Territory of Alaska from points located outside the Territory (R. 18, 27; 30-31). Total sales amount to approximately \$226,000 annually (R. 18, 27; 31).

Upon these facts, the Trial Examiner concluded that the Company's operations were insufficient to satisfy the minimal requirements established by the Board in 1954 for the assertion of its jurisdiction over commerce in the case of *Jonesboro Grain Drying Cooperative*, 110 N. L. R. B. 481, 483-484. Although under the jurisdictional standards formulated in 1950 the Board exercised the full reach of its statutory power in the Territories,³ the Trial Examiner noted (R. 19-22) that since the revision of these standards in 1954 the Board in three cases had refused to assert jurisdiction over various industries located in the Territories. *The Virgin Isles Hotel, Inc.*, 110 N. L. R. B. 558; *Sixto Ortega*, 110 N. L. R. B. 1917; *Union Cab Co.*, 110 N. L. R. B. 1921. In so refusing, the Board reasoned that similar industries located in

³ See, for example, *Panaderia Sucesion Alonso*, 87 N. L. R. B. 877, 878 (Puerto Rico); *Northern Fisheries, Inc.*, 33 N. L. R. B. 919, 920 (Alaska); *Inter-Island Steam Navigation Co.*, 34 N. L. R. B. 132, 133-134 (Hawaii); *N. L. R. B. v. Gonzales Padin Co.*, 161 F. 2d 353 (C. C. 1) (Puerto Rico).

one of the States would not be regarded as having sufficient impact upon interstate commerce to warrant asserting jurisdiction, and the impact upon commerce was no greater because these industries were located in the Territories (R. 21). Accordingly, in the instant case, perceiving no basis for applying some, but not other, State jurisdictional standards to the Territories, the Trial Examiner reasoned that the necessary result of these cases was to make the State jurisdictional criteria applicable "in all respects" to the Territories (R. 23). Accordingly, as the Company's operations failed to satisfy the criteria set forth in the *Jonesboro* case, the Examiner dismissed the complaint on the ground that the Company's operations did not have sufficient impact upon commerce to warrant the assertion of jurisdiction (*ibid.*).

II. The Board's decision and order

Approximately 3 months later, while the case was pending before the Board on exceptions to the Examiner's report, the Board reapprised its jurisdictional policies respecting the Territories in connection with its decision in *Conrado Forestier, d/b/a Cantera Providencia*, 111 N. L. R. B. 848. In this decision, the Board, with one member dissenting, concluded that instead of exercising the full reach of its statutory power as it had theretofore, it would better effectuate the policies of the Act to confine its jurisdiction to those businesses having a significant impact upon commerce in the Territories in the same manner as it limited jurisdiction with respect to businesses in the States. In the *Conrado Forestier* case the Board explained, as follows (*ibid.*):

Since the promulgation of the new jurisdictional standards, the Board has held where specially applicable rules have been established, similar enterprises situated in the Territories are required to conform to the same jurisdictional criteria as are applicable in the 48 States.¹ In these earlier cases, the Board indicated that no exceptions to the Territories was warranted: that the impact on commerce of business operations having their situs in the Territories is no greater than that of similar enterprises located in the 48 States. * * * Accordingly, * * * in future cases the Board's entire jurisdictional standards will be uniformly applied in the Territories as in the several States.

¹ *The Virgin Isles Hotels, Inc.*, 110 N. L. R. B. 558 (hotel); *Sixto Ortega d/b/a Sixto*, 110 N. L. R. B. 1917 (retail bakery); *Union Cab Company*, 110 N. L. R. B. 1921 (local taxicab operation).

When the instant case came before the Board for decision, the Board adopted the Examiner's findings of fact regarding the business operations of the Company and, relying upon the *Jonesboro* and *Forestier* decisions, concluded that it would better effectuate the policies of the Act not to assert jurisdiction, which could only be justified in this case on the theory of the Board's "plenary power" in the Territories (R. 26-27). Accordingly, the Board affirmed the Examiner's dismissal of the proceedings without reaching the merits of the unfair labor practices charged (R. 27-28).

QUESTIONS PRESENTED

I. Whether the Board has discretionary authority to decline jurisdiction in proceedings brought before it respecting a business operating in a Territory where the Board, in its judgment, finds that such action would best effectuate the policies of the Act.

II. Whether the Board's determination not to assert jurisdiction in the case at bar was a reasonable exercise of the Board's discretion.

ARGUMENT

I. The Board has discretionary authority to decline to assert jurisdiction where it finds that such action would best effectuate the policies of the Act

A. The Board's broad powers under Section 10 of the Act

Settled law establishes that the Board, notwithstanding its statutory power, may decline to assert jurisdiction if in its reasoned judgment the policies of the Act would be best effectuated by adopting that course. The source of the Board's authority to decline jurisdiction, long exercised for a variety of reasons,⁴ including the insubstantiality of the enterprise's impact on commerce,⁵ stems from Section 10 of the Act which vests "in the Board complete discre-

⁴ See, e. g., *Aluminum Co. of America*, 1 N. L. R. B. 530, 537, 538; *Shenendoah Dives Mining Co.*, 11 N. L. R. B. 885, 888; *Ellicott Machine Corp.*, 54 N. L. R. B. 732, 735; *Timken Roller Bearing Co.*, 70 N. L. R. B. 500, 501; *Allis-Chalmers Mfg. Co.*, 72 N. L. R. B. 855, 856; *Victor Products Corp.*, 99 N. L. R. B. 516, 519; *Deena Artware, Inc.*, 112 N. L. R. B. No. 44.

⁵ See, e. g., *Lacey Milling Co.*, 48 N. L. R. B. 914, 915; *Johns-Manville Corporation*, 61 N. L. R. B. 1, 2; *McDonald Cooperative Dairy Co.*, 58 N. L. R. B. 552, 553; *S & R Baking Co.*, 65 N. L. R. B. 351, 352; *Olympia Stadium Corp.*, 85 N. L. R. B. 389, 390; *The White Sulphur Springs Co.*, 85 N. L. R. B. 1487, 1488.

tionary power to determine in each case whether the public interest requires it to act.” *N. L. R. B. v. Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), certiorari denied, 314 U. S. 693. Thus, under Section 10 (a) of the Act, the Board is “empowered”, not “directed”, to prevent any person from engaging in any unfair labor practice affecting commerce, and Section 10 (b) confers upon the General Counsel of the Board the “power,” not the mandatory obligation, to issue a complaint upon the filing of unfair labor practice charges. Congress thereby plainly manifested its intention that “the Board’s jurisdiction was not to be exercised unless in the opinion of the Board the unfair labor practice complained of interfered so substantially with the public rights created by Section 7 as to require its restraint in the public interest.” *Local Union No. 12, et al. v. N. L. R. B.*, 189 F. 2d 1, 4 (C. A. 7), certiorari denied, 342 U. S. 868. See also, *Haleston Drug Stores v. N. L. R. B.*, 187 F. 2d 418, 420–422 (C. A. 9), certiorari denied, 342 U. S. 815; *N. L. R. B. v. Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), certiorari denied, 314 U. S. 693.

Accordingly, both with respect to the original Act and the Act as amended in 1947, the courts have recognized that, despite the existence of legal jurisdiction in the Board, issuance of an unfair labor practice complaint may be withheld,⁶ and even where a

⁶ *N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 18–19; *Anthony v. N. L. R. B.*, 132 F. 2d 620, 621 (C. A. 9); *Lincourt v. N. L. R. B.*, 170 F. 2d 306, 307 (C. A. 1); *N. L. R. B. v. National Broadcasting Company*, 150 F. 2d 895, 899 (C. A. 2);

complaint has issued the Board may “properly” dismiss without determining the merits of the alleged unfair labor practices,⁷ if in its opinion this course would best effectuate the policies of the Act. As this Court explained in *N. L. R. B. v. M. L. Townsend*, 185 F. 2d 378, 383, certiorari denied, 341 U. S. 909, “Many factors such as lack of funds or the imminence of a more drastic disruption of commerce in another industry might dictate that in a particular case powers explicitly granted should not be exercised.” See also *Haleston Drug Stores, Inc. v. N. L. R. B.*, 187 F. 2d 418, 421–422 (C. A. 9), certiorari denied, 342 U. S. 815. Indeed, the Board’s practice of declining to exercise its jurisdiction because of the insignificant impact upon commerce is in precise accord with the purpose, expressed in Section 1 of the Act, “to elimi-

Wilke v. N. L. R. B., 15 Labor Cases, par. 64798 (C. A. 4); *N. L. R. B. v. The Barrett Company*, 120 F. 2d 583, 586 (C. A. 7); *General Drivers, Chauffeurs and Helpers v. N. L. R. B.*, 179 F. 2d 492, 494–495 (C. A. 10); *Progressive Mine Workers v. N. L. R. B.*, 3 Labor Cases, par. 60133 (C. A. D. C.); *White v. N. L. R. B.*, 9 LRRM 657 (C. A. D. C.). See also *Jacobsen v. N. L. R. B.*, 120 F. 2d 96, 100 (C. A. 3).

⁷ *N. L. R. B. v. Denver Building & Construction Trades Council*, 341 U. S. 675, 684; *N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 19; *Haleston Drug Stores, Inc. v. N. L. R. B.*, 187 F. 2d 418, 422 (C. A. 9), certiorari denied, 342 U. S. 815; *N. L. R. B. v. Daboll*, 216 F. 2d 143, 144–145 (C. A. 9), certiorari denied, 348 U. S. 917; *N. L. R. B. v. Federal Engineering Co.*, 153 F. 2d 233, 234 (C. A. 6); *Local Union No. 12 v. N. L. R. B.*, 189 F. 2d 1, 4–5 (C. A. 7), certiorari denied, 342 U. S. 868; cf. *Brooks v. N. L. R. B.*, 348 U. S. 96, 104, n. 16, where the Supreme Court took notice of recent changes in the Board’s “jurisdictional yardsticks” and the Board’s broad discretion in exercising its statutory powers.

nate the causes of certain *substantial* obstructions to the free flow of commerce.” [Emphasis supplied.]

Thus, abundant judicial authority establishes, as the language of the Act plainly states, that the Board may decline to exercise its statutory powers if, in its considered judgment, the policies of the Act would be better effectuated by refusing to exercise its powers.

B. The Board has such discretionary authority to decline jurisdiction with respect to business enterprises located in the Territories

These judicial principles establishing the authority of the Board to decline jurisdiction over interstate enterprises located in the States likewise establish, we submit, that the Board has discretionary authority to decline jurisdiction over a business located in one of the Territories. For, regardless of the location of the business which is the situs of the labor dispute, the considerations respecting the effectuation of the policies of the Act and the limitations of the Board's resources for dealing with such disputes remain constant. Thus, “the imminence of a more drastic interruption of commerce in another industry,” as this Court observed in *N. L. R. B. v. M. L. Townsend*, 185 F. 2d 378, 383, certiorari denied, 341 U. S. 909, may compel the Board to decline jurisdiction in a particular case, regardless of whether that business is located in a Territory or one of the States. And similarly, the “lack of funds” (*N. L. R. B. v. Townsend, supra*) or other limitations of time and personnel require the Board to husband its resources—deciding only the more important cases in order better to effectuate the purposes of the Act—regardless of whether the business operation is State or Territorial. Indeed, unless

the Board has the power to decline to exercise its jurisdiction over a Territorial business, the Board would have to exercise jurisdiction over small Territorial business no matter how insignificant. Necessarily the Board's resources would be consumed in deciding minor labor disputes arising within the Territories at the cost of neglecting those disputes arising in the States or Territories which substantially affect interstate commerce.

Contrary to petitioner's claim (Pet. br. pp. 4, 7, 15, 17) the existence of the Board's authority to decline jurisdiction over business enterprises in the Territories is fully consistent with the language of Section 2 (6) of the Act which defines commerce broadly to include "trade * * * within * * * any Territory." Admittedly, as petitioner asserts (Pet. br., pp. 6, 9) this language authorizes the Board to exercise its powers widely in the Territories, even with respect to those operating wholly inside the boundaries of a Territory. Obviously, however, the grant of such extensive power to the Board does not mean that the Board lacks all discretion to decline jurisdiction but must exercise its powers to the fullest in every instance. To the contrary, by using this broad language Congress manifested its intention to confer discretionary power upon the Board to refuse jurisdiction. For, as the Supreme Court observed in *Addison v. Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 611, "when Congress wants to give wide discretion it uses broad language. * * * [Thus], in the National Labor Relations Act Congress gave the Board the authority to take such action 'as will effectuate the policies of

this Act.' * * * The 'policies' of the Act were so broadly defined by Congress that the determination of the relation of remedy to policy is peculiarly a matter for administrative competence." [Citations omitted.] The Court, in the *Holly Hill* case, expressly distinguishing the situation under the National Labor Relations Act, held that in view of the exemptions enumerated by Congress in the Fair Labor Standards Act (29 U. S. C. Sec. 203), the Administrator lacked authority to alter the scope of that statute in any other manner by administrative interpretation. Moreover, petitioner's argument proves too much. For, if the mere grant of such extensive power to the Board respecting the Territories compels the Board to exercise that power in the Territories, parity of reasoning requires the Board to exercise its extensive power respecting interstate businesses in the States. Uniform judicial precedent, however, is to the contrary (*supra*, pp. 7-10).

Neither is there any merit to petitioner's contention (Pet. br., pp. 5-6, 18) that the Board's refusal to assert jurisdiction would empower a Territory to assert jurisdiction and thereby conflicts with the provisions of Section 10 (a) of the Act which prescribes the conditions for the cession of Board jurisdiction to the States and Territories.⁸ In the first place, it is still an undecided question whether the result of the

⁸ Section 10 (a), in relevant part, provides as follows: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce * * * *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any in-

Board's declination of jurisdiction is to confer jurisdiction upon the local government. Only recently, in *Garner v. Teamsters Union*, 346 U. S. 485, 488, and *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933, the Supreme Court expressly reserved that question as it had done under the original Act in *Bethlehem Steel Co. v. N. Y. S. L. R. B.*, 330 U. S. 767, 776. Compare also *Garmon v. Building Trades Council*, 37 L. R. R. M. 2233 (Calif. Sup. Court, decided December 2, 1955); with *N. Y. S. L. R. B. v. Wags Transportation System*, 130 N. Y. S. 2d 731 (Sup. Ct., 1954). Secondly, even if the local government acquires jurisdiction by virtue of the Board's refusal to exercise its jurisdiction, such power results by operation of law, rather than by cession, for in merely declining to assert jurisdiction in a given area there is "no concession or delegation of power." *Bethlehem* case, *supra*, at 776. Finally, if the provisions of Section 10 (a) bar the Board from declining jurisdiction over an industry subject to the Act which is located in the Territories the same provision for identical reasons would prohibit the Board from declining to assert jurisdiction over an interstate business located in the States. For, on the one hand, if as petitioner implies (Pet. br., p. 6, 18), such declination by the Board is an evasion of Section 10 (a) with respect to industry in the Territories, it is an evasion with respect to industry in the States. On the other

dustry * * * even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

hand, if as petitioner inconsistently argues (Pet. br., pp. 9, 17, 18), the doctrines of preemption prohibit local governmental regulation of a labor dispute arising in an industry over which the Board may, but does not, assert jurisdiction, thereby creating a "no-man's land" not subject to any governmental regulation, this void results whether the industry is located in one of the States or in one of the Territories. And indeed, Section 10 (a) makes no distinction between Territories and States.

In sum, the very considerations which establish the existence of the Board's power to decline jurisdiction with respect to industries engaged in interstate commerce located in one of the States likewise establish that the Board has authority to decline jurisdiction with respect to enterprises located in one of the Territories. Conversely, the identical arguments by which petitioner would deny the Board such authority with respect to industries in the Territories apply with equal force with regard to the Board's refusal to assert jurisdiction over State industries engaged in interstate commerce.

II. The Board's determination to decline jurisdiction in the instant case was neither arbitrary nor capricious and is binding on review

A. The scope of judicial review

The broad discretion vested in the Board regarding the exercise of its statutory jurisdiction necessarily restrictively circumscribes the scope of judicial review. In the words of this Court, "The general rule is that, where the Board has jurisdiction, * * *, whether such jurisdiction should be exercised is for

the Board, not the courts, to determine.” *N. L. R. B. v. Stoller*, 207 F. 2d 305, 307, certiorari denied, 347 U. S. 919; see also *N. L. R. B. v. Daboll*, 216 F. 2d 143, 144–145 (C. A. 9), certiorari denied, 348 U. S. 917; *Katz v. N. L. R. B.*, 196 F. 2d 411, 413 (C. A. 9); *Haleston Drug Stores, Inc. v. N. L. R. B.*, 187 F. 2d 418, 421–422 (C. A. 9), certiorari denied, 342 U. S. 815; *N. L. R. B. v. M. L. Townsend*, 185 F. 2d 378, 383 (C. A. 9), certiorari denied, 341 U. S. 909; *Optical Workers’ Union v. N. L. R. B.*, 227 F. 2d 687, 691, 2351 (C. A. 5) petition for rehearing denied January 19, 1956, 37 L. R. R. M. 2350, 2351; *Local Union No. 12 v. N. L. R. B.*, 189 F. 2d 1, 4 (C. A. 7), certiorari denied, 342 U. S. 868.

The reasons underlying this repeated holding by the courts are manifest. The determination of the most efficient allocation of agency resources, time, personnel and public funds, involves the resolution of many imponderable factors which are not readily subject to judicial review. Like political questions, which are “essentially legislative or administrative” (*Federal Radio Commission v. General Electric Co.*, 281 U. S. 464, 469), there are no “satisfactory criteria for judicial determination” (*Coleman v. Miller*, 307 U. S. 433, 454–455; see also *C. & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U. S. 103, 111). It is for the Board to determine the “policy regarding what cases it should assert jurisdiction over, in order to effectuate the purposes of the Act. It is in regard to the shaping of such policy—wherein flexibility is so essential—that we hold that juristic concepts * * * have no conclusive relevance.” *Optical Workers’*

Union v. N. L. R. B., *supra*. Particularly is this true where, as here, the factors underlying the Board's administrative determination concern the efficient allocation of public funds, personnel and time.

This is not to say, however, that the Board enjoys a completely unbridled discretion in this regard, or that the Board may act in an arbitrary and capricious manner. The Board, of course, recognizes that it, "like any other quasi-judicial agency, has no authority to act capriciously or arbitrarily." *Breeding Transfer Co.*, 110 N. L. R. B. 493, 495. What these judicial precedents do establish, rather, is that the Board has a great latitude in this area where "factors outside [the Court's] domain of experience may come into play." *Phelps Dodge Corp. v. N. L. R. B.*, 313 U. S. 177, 195.

We turn now to the question whether the Board's policies regarding the Territories and its application to the case at bar can be said to be arbitrary or an "abuse of its discretion".

B. The Board's determination that it would not effectuate the policies of the Act to assert jurisdiction in the instant case was neither arbitrary nor capricious

In 1950, following a long study of the cases where the Board had declined jurisdiction, the Board issued a series of decisions enunciating the standards which were to govern its exercise of jurisdiction in the future. Thereafter, with 3 years experience behind it, the Board, on October 26, 1954 issued another series of decisions establishing revised standards which, "in the light of the Board's experience * * * and also in the light of changing economic con-

ditions," seemed warranted. *Breeding Transfer Co.*, 110 N. L. R. B. 493, 494. In establishing these revised standards the Board was guided by the very same criteria spelled out by the Board at the time of the enunciation of the original standards in 1950. Thus, the Board stated (110 N. L. R. B. at 497):

* * * our new standards are in a large measure a result of a careful study and consideration of the many valuable analyses contained in those committee reports [of legal assistants]. This is not to say that our final decision was not ultimately one of policy and of considered judgment by the Board members themselves. By their very nature the standards which we now announce cannot be proved scientifically like mathematical problems. In making these modifications, we have given due consideration to all of the criteria spelled out by the Board in 1950, including (1) the problem of bringing the case load of the Board down to manageable size, (2) the desirability of reducing an extraordinarily large case load in order that we may give adequate attention to more important cases, (3) the relative importance to the National economy of essentially local enterprises as against those having a truly substantial impact on our economy, and (4) over-all budgetary policies and limitations.

Manifestly, the Board properly revised the standards in the light of changed conditions and experience gained since their adoption in 1950, and the standards, based on the criteria set forth in 1950, were reasonable. *Optical Workers' Union Local 24859 et al. v. N. L. R. B.*, 227 F. 2d 687, 691 (C. A. 5), petition for

rehearing denied, 37 L. R. R. M., 2350 (January 19, 1956).

Although the revised standards were enunciated with respect to businesses affecting commerce located in the States, the Board was immediately thereafter confronted with the problem regarding enterprises located in the Territories. In *The Virgin Isles Hotel, Inc.*, 110 N. L. R. B. 558, the Board was faced with the problem of whether the longstanding policy not to exercise jurisdiction over hotels located in the States should apply to the Territories despite the Board's previous policy to assert "plenary jurisdiction over all business enterprises operating" in the Territories (110 N. L. R. B. at 559).⁹ After reexamining the earlier decisions, the Board concluded that although hotel operations in the Territories, as in the States, were not unrelated to commerce, the impact on commerce of a labor dispute by hotel employees in the Territories was insufficient to warrant the assertion of jurisdiction because "the relationship to commerce is no greater here [in a Territory] than in the case of a hotel operating in one of the 48 States (*ibid.*). Again, when confronted with a similar problem relating to taxicabs operating in the Territory of Alaska,¹⁰ a local retail bakery located in the Commonwealth of Puerto Rico,¹¹ and a radio station also located in the Commonwealth of Puerto Rico,¹²

⁹ The Board previously asserted jurisdiction over hotels located in the Territories. *Roy C. Kelly*, 95 N. L. R. B. 6 (hotel located in the Territory of Hawaii).

¹⁰ *Union Cab Company*, 110 N. L. R. B. 1921.

¹¹ *Sisto Ortega*, 110 N. L. R. B. 1917.

¹² *South P. R. Broadcasting Corp.*, 111 N. L. R. B. 272.

the Board on similar reasoning declined to assert jurisdiction. Finally, when the Board was once again confronted with the question of asserting jurisdiction in one of the Territories on the basis of its "plenary" power, since the business operations were insufficient to meet the jurisdictional standards, the Board decided to decline jurisdiction, stating (*Conrado Forestier*, 111 N. L. R. B. 848) :

Since the promulgation of the new jurisdictional standards, the Board has held where specially applicable rules have been established, similar enterprises situated in the Territories are required to conform to the same jurisdictional criteria as are applicable in the 48 States. In those earlier cases, the Board indicated that no exception as to the Territories was warranted: that the impact on commerce of business operations having their situs in the Territories is no greater than that of similar enterprises located in the 48 States. * * * Accordingly, * * * in future cases the Board's entire jurisdictional standards will be uniformly applied in the Territories as in the several States.

In concluding that the general jurisdictional standards should apply to the Territories, the Board was recognizing the same considerations involved in formulating the State jurisdictional standards, namely, the number of undecided cases, limitations of budget, personnel and time, necessity of giving adequate attention to the more important cases, and the relative importance to the National economy of pending labor disputes. Obviously, the essentially local industries whose operations are largely confined

within the boundaries of one Territory are not likely to have as substantial an impact upon commerce as those industries which are not so confined. Moreover, the backlog of undecided cases has remained inordinately large, well over 4,000, notwithstanding the increased efficiency of the agency in processing contested cases.¹³ In these circumstances the Board had no choice but to draw a line so as to perform its duties most effectively. Admittedly the Board might have drawn the line differently,¹⁴ but to say that the line might have been drawn differently, does not mean that the line which the Board did draw was unreasonable. Indeed, as the Supreme Court has said, "when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it

¹³ In the fiscal year 1953, there were nearly 15,000 cases filed with the agency, of which more than 3,000 required processing to final decision by the 5-man Board. *N. L. R. B. Eighteenth Annual Report* (G. P. O., 1954) pp. 1, 93. The backlog of undecided cases at the end of that fiscal year amounted to 4,289, notwithstanding the substantial reduction in time required to process contested cases resulted in 3,053 decisions, the largest number of such cases during any one year in the Board's history. *Id.* at 5. By the end of the fiscal year 1954, the backlog had risen to 4,394 undecided cases. *N. L. R. B. Nineteenth Annual Report* (G. P. O., 1955) p. 155.

¹⁴ Thus, for example, the Board might have decided to assert jurisdiction over wholly intra-Territorial industries which had in excess of a specified volume of business. In this connection, it is noteworthy that the two members who failed to join in the majority decision in *The Hotel Virgin Isles, Inc.*, 110 N. L. R. B. 558, disagreed with each other. Member Peterson, who concurred in that decision not to assert jurisdiction, expressed doubts that the Board should exercise jurisdiction in the Virgin Isles in any case. Member Murdock argued that the Board should assert jurisdiction because it has "plenary" jurisdiction in the Territory.

precisely, the decision of the [Board] must be accepted unless * * * it is very wide of any reasonable mark." *Addison v. Holly Hill Fruit Co.*, 322 U. S. 607, 611. So judged, the Board's decision to apply its jurisdictional standards to the Territories cannot be said to be "wide of any reasonable mark," either with respect to the factors underlying the formulation of the jurisdictional standards or with respect to the resultant policy which enables the Board, while declining jurisdiction over essentially small local enterprises, to concentrate its resources in determining controversies arising in the more important industries, whether such industries are located in the States or the Territories.

Although variously stated in its brief (pp. 4, 9, 12-13, 17), petitioner's only argument to the contrary is that the Board "ignored" or "refused to consider" the phrase "within * * * any Territory" which is contained in Section 2 (6) of the Act. In petitioner's view, the Board was compelled to adopt separate standards regarding trade "within" the Territories, in light of their location, size, and economic development, so that, in the case at bar, the Board should have asserted jurisdiction on the basis of the \$226,000 intra-Territorial sales made by the Company.

It does not follow, however, from the fact that the Board ultimately decided to apply the State standards to the Territories, instead of establishing a different standard respecting trade "within * * * any Territory," that the Board either ignored the statutory language or failed to consider the local conditions of

the Territories.¹⁵ On the contrary, as the cases show, the Board did consider the circumstances of the Territories and the business enterprises affected. Thus, in three cases (*supra*, pp. 18-19) preceding *Conrado Forestier*, 111 N. L. R. B. 848, the Board specifically stated the nature, size and location of each business and concluded that, at least where special standards had been adopted for the assertion of jurisdiction in the States, there was not sufficient reason for declining to apply these standards to the Territories. And in the *Conrado Forestier* case itself the Board noted that the "sole issue stems from the fact that the Employer's business is located in a Territory." See also the dissenting opinions of Member Murdock in these cases. Moreover, as petitioner notes in its brief (pp. 15-16), the Board did adopt a special standard for the District of Columbia, asserting its "plenary" jurisdiction without limitation (*M. S. Ginn & Co.*, 114 N. L. R. B. No. 25; *Carlyle Hotel of Washington, Inc.*, 36 L. R. R. M. 1542; *Dodge Hotel Co.*, 36 L. R. R. M. 1542). In adopting this special standard the Board's decisions recognized the special circumstances of the District of Columbia, including its unique character as the seat of the National Government, its small area and its proximity to the States of Maryland and Virginia, and the resultant dependence of commercial activities carried on within the

¹⁵ In this connection it is noteworthy that the Court of Appeals for the District of Columbia Circuit in *N. L. R. B. v. Eanet*, 179 F. 2d 15, 18, suggested that the Board should have applied the same standards to the District of Columbia that it had previously adopted with respect to a business located in one of the States.

District of Columbia upon the channels of interstate commerce.¹⁶

Accordingly, there is no merit in petitioner's argument that the Board, by applying the State standards uniformly to all of the Territories, was arbitrary and capricious in failing to take cognizance of "trade * * * within * * * any Territory." Admittedly the application of these standards to the Territories may exclude local Territorial enterprises from the scope of the Board's processes notwithstanding that these enterprises are important in the economy of the Territories. The Board, however, has the paramount duty under the Act to consider its obligations in the light of the importance to the National economy, not merely the significance to any one Territory. In so doing the Board may properly weigh the benefits of asserting jurisdiction over local enterprises operating "within" a Territory in the light of its limited administrative resources and determine, as it did, that the overall policies of the Act would be better effectuated by declining to assert jurisdiction solely on the basis of intra-Territorial business.

¹⁶ For these reasons, there is manifestly no warrant for petitioner's contention that the Board established "arbitrary and unreasonable 'jurisdictional standards'" because the standard adopted for the District of Columbia was different from the standards applied in the States and Territories (Pet., br., p. 19). Moreover, this contention is in conflict with petitioner's repeated assertions in its brief, such as at page 9, that the Board failed to consider the special circumstances of the Territories, such as the "location, size and economic and industrial development of the Territories." In any event, even if the Board erred in formulating the standard applicable to the District of Columbia, this does not establish that the Board was arbitrary in previously establishing a different standard applicable to a soft-drink company in the Territory of Alaska.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for review herein should in all respects be dismissed.

THEOPHIL C. KAMMHOLZ,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

OWSLEY VOSE,

JOHN E. JAY,

Attorneys,
National Labor Relations Board.

FEBRUARY 1956.

A P P E N D I X

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

“FINDINGS AND POLICIES

“SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest * * *

“Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

“Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encourag-

ing the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * *

DEFINITIONS

SEC. 2. When used in this Act—

* * * *

(6) The term “commerce” means trade, traffic, commerce transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country, any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term “affecting commerce” means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be af-

fectured by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; * * *

(b) The Board shall decide in each case whether in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial num-

ber of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

“PREVENTION OF UNFAIR LABOR PRACTICES

“SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This

power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

“(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

“(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have

power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

“(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to

make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

No. 14780

United States
Court of Appeals
for the Ninth Circuit

WESLEY LAWRENCE UFFELMAN,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

OCT 20 1955

PAUL P. O'BRIEN, CLERK

No. 14780

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Defendant and Appellant.

LLOYD H. BURKE,

United States Attorney,

RICHARD FOSTER,

Assistant United States Attorney,

Post Office Building,
San Francisco, California,

Attorneys for Plaintiff and Appellee.

In the United States District Court for the Northern District of California, Southern Division

Criminal No. 34390

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY LAWRENCE UFFELMAN,

Defendant.

INDICTMENT

(Violation: Section 12 (a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a)).

The Grand Jury charges: That Wesley Lawrence Uffelman, defendant herein, being a male citizen, of the age of 24 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948", as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act", hereinafter called "said Act", and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 23 of the Selective Service System in the City of Sacramento, County of Sacramento, State of California, which said Local Board No. 23

was duly created, appointed and acting for the area of which the said defendant is a registrant, did, on or about the 27th day of April, 1954, in the City of Sacramento, County of Sacramento, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class 1-O, did then and there knowingly refuse and fail to comply with the order of his said Local Board No. 23 to then and there report to said Local Board on the 27th day of April, 1954, in the City of Sacramento, County of Sacramento, State and Northern District of California, for the purpose of receiving instructions to proceed to the place of employment designated by said Local Board No. 23 for the performance of civilian work contributing to the maintenance of the national health, safety and interest, to-wit, institutional work, Los Angeles County Department of Charities, Los Angeles, California, as provided in the said Act and the rules and regulations made pursuant thereto.

A True Bill.

/s/ JOHN L. FARLEY, JR.

/s/ LLOYD H. BURKE,

United States Attorney

Approved as to Form:

/s/ S. B. C.

[Endorsed]: Presented in Open Court and Ordered Filed January 19, 1955.

[Title of District Court and Cause.]

MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 14th day of February, in the year of our Lord one thousand nine hundred and fifty-five.

President: The Honorable Michael J. Roche, District Judge.

This case came on regularly this day for arraignment. Donald B. Constine, Esq., Assistant United States Attorney, was present on behalf of the United States. The defendant was present in proper person. J. B. Tietz, Esq., attorney for defendant was not present this day. Defendant advised the Court that he proceeds in his own behalf until matter of trial.

Defendant was duly arraigned upon the indictment filed herein against him, stated his true name to be as charged. The substance of the charge was stated to defendant and defendant stated that he understood the charge against him. Copy of indictment was handed to defendant.

Defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty" to the indictment filed herein against him, which said plea was ordered entered.

With approval of Court and consent of government, defendant waived trial by jury in writing.

Ordered case continued to March 10, 1955 for trial (Court).

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, February 14, 1955.

/s/ WESLEY L. UFFELMAN,
Defendant

/s/ DONALD B. CONSTINE,
Asst. United States Attorney

Approved:

/s/ MICHAEL J. ROCHE,
Judge, United States District Court, Northern District of California.

[Endorsed]: Filed February 14, 1955.

[Title of District Court and Cause.]

WAIVER OF JURY TRIAL

In conformity with Rule 23 of the Rules of Criminal Procedure for the District Courts of the United

States, effective March 21, 1946, we, the undersigned, do hereby waive trial by jury and request that the above entitled cause be tried before the Court sitting without a jury.

Dated: San Francisco, California, 3/10, 1955.

/s/ WESLEY L. UFFELMAN,

Defendant

/s/ J. B. TIETZ,

Attorney for Defendant

/s/ R. H. FOSTER,

Asst. United States Attorney

Approved:

/s/ MICHAEL J. ROCHE,

Judge, United States District Court, Northern District of California.

[Endorsed]: Filed March 10, 1955.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL

May It Please the Court:

Now comes the defendant and moves the Court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove

a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The denial of the ministerial classification is illegal, arbitrary and capricious because the draft boards employed artificial standards in determining what constitutes a minister of religion within the meaning of the Act and Regulations; and they did not follow the definition of the term used in the Act and Regulations in determining the claim of the defendant as a minister of religion.

4. The denial of the ministerial classification by the draft boards was arbitrary and capricious in that they held that the performance of secular work by the defendant, alone, without determining whether it was his avocation and used his performance of secular work to defeat illegally his ministerial status because the undisputed evidence showed that he is not engaged in secular work as a main business but only incidentally to his main work of the ministry, and that, according to the Act and Regulations, he is regularly and customarily engaged in teaching and preaching the doctrines and principles of a recognized church and pursues such preaching work as his vocation and does not preach incidentally to the performance of any secular work; and, therefore, the draft board order is illegal, contrary to law and without basis in fact.

5. The denial of the claim for exemption as a minister of religion by all of the draft boards, and each of them, is without basis in fact, arbitrary, capricious and contrary to law.

6. The order of the local board for defendant to perform civilian work at L. A. Dept. of Charities and Sections 1660.1 and 1660.20 of the Selective Service Regulations are in conflict with the Act, because the work is not national or federal work as required by the Universal Military Training and Service Act.

7. The act, as construed and applied by the Regulations and the order, calls for a private nonfederal labor draft for the performance of services that are not exceptional or related to the National Defense, in violation of the Thirteenth Amendment to the United States Constitution.

8. The Act, as construed and applied by the Regulation and order, is unconstitutional because it deprives the defendant of due process of law contrary to the Fifth Amendment to the Constitution.

9. Section 462 (a) of the Act, Part 1660 of the Regulation, insofar as they have been construed and applied to the defendant are an unreasonable abridgment of his right of property, contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

10. Sections 1660.20 (d) and 1660.30 of Part 1660 of the Regulations are contrary to the First, Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

11. Defendant was denied procedural due process in that the local board failed to have available an Advisor to Registrants and to have posted con-

ney. Ordered that the motion for judgment of acquittal be, and the same is hereby, Denied. The Court Adjudged defendant Guilty of the offense charged in the indictment. Ordered that defendant be confined in an institution to be designated by the U. S. Attorney General for a period of One (1) Year and One (1) Day. Ordered that the bond on this indictment be exonerated. Ordered that defendant be granted a ten (10) day stay of execution of judgment. Ordered that judgment be entered herein accordingly.

Ordered that the motion for bond pending appeal be granted and bond set at One Thousand Dollars (\$1000).

In the United States District Court for the Northern District of California, Southern Division

No. 34390

UNITED STATES OF AMERICA

vs.

WESLEY LAWRENCE UFFELMAN

JUDGMENT AND COMMITMENT

On this 15th day of April, 1955, came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of violating Section 12(a), Universal Military Training and Service Act, 50 U.S.C. App. 462(a)—Failure to Report to Local

Board — (Defendant Wesley Lawrence Uffelman did, on or about April 27, 1954, at Sacramento, California, knowingly refuse and fail to comply with order of his Local Board to report for purpose of receiving instructions to proceed to place of employment (institutional work) designated by said Local Board for performance of civilian work contributing to maintenance of national health, safety and interest), as charged in the indictment (single count); and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year and One (1) Day.

It Is Adjudged that the defendant be granted a ten (10) day stay of execution of judgment.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ OLIVER J. CARTER,

United States District Judge

Examined by:

/s/ DONALD B. CONSTINE,

Assistant U. S. Attorney

The Court recommends commitment to an institution to be designated by U. S. Attorney General.

[Endorsed]: Judgment and Commitment Filed this 20th day of April, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Wesley Lawrence Uffelman, resides at 2994 - 19th Avenue, Sacramento 20, California. Appellant's Attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to proceed to a place of employment designated by his local board, contrary to U. M. T. & S. Act, Title 50 App., Sec. 462 (a).

On April 15, 1955 after a verdict of Guilty the Court sentenced the appellant to confinement in an institution to be selected by the Attorney General for one year and one day.

I, J. B. Tietz, appellant's attorney being authorized by him to perfect an appeal do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

/s/ J. B. TIETZ,

Attorney for Appellant

[Endorsed]: Filed April 15, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The following are hereby designated as the record which is material to the proper consideration of the Appeal filed by Wesley Lawrence Uffelman, in the above entitled cause:

1. Indictment.
2. Reporter's Transcript (as requested of Reporter).
3. All Exhibits in evidence as proffered are to be transmitted to the Court of Appeals.
4. Notice of Appeal.
5. Designation of Record.
6. All Stipulations.
7. All written motions.

/s/ J. B. TIETZ,

Attorney for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 7, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, and exhibits, listed below, are the originals filed in this court, or true and cor-

rect copies of orders entered on the minutes of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Indictment.

Minutes of arraignment and plea on Feb. 14, 1955.

Waiver of Jury trial signed Feb. 14, 1955.

Waiver of Jury trial signed Mar. 10, 1955.

Motion for judgment of acquittal.

Minutes of judgment on April 15, 1955.

Judgment and commitment.

Notice of appeal.

Designation of record.

Plaintiff's Exhibit No. 1.

Defendant's Exhibit A.

One volume of Reporter's Transcript of March 11, 1955.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 27th day of May, 1955.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By WM. C. ROBB,
Deputy

In the United States District Court for the Northern District of California, Southern Division

No. 34390

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WESLEY LAWRENCE UFFELMAN,

Defendant.

REPORTER'S TRANSCRIPT

Friday, March 11, 1955

Before: Hon. Oliver J. Carter, Judge.

Appearances: For the Government: Lloyd H. Burke, U. S. Attorney, by Richard H. Foster, Assistant U. S. Attorney. For the Defendant: J. B. Tietz. [1*]

The Clerk: United States vs. Uffelman, on trial.

Mr. Foster: Ready for the United States.

Mr. Tietz: Ready for the defendant.

(Opening statement on behalf of the Government.)

The Court: Proceed, Mr. Foster.

Mr. Foster: I understand that counsel will stipulate to the introduction of the Selective Service file in this case.

The Court: Is that correct, Mr. Tietz.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

after being ordered to report, he did not report to the office of the local board for instructions.

The Court: That was the day he was supposed to appear?

Mr. Foster: That was the day he was supposed to appear.

Now it is my understanding that counsel will stipulate that on April 27, 1954, although ordered to report for instructions, the defendant did not report.

Mr. Tietz: So stipulated.

Mr. Foster: That will conclude the Government's case. [5]

Mr. Tietz: The defense has a motion for a judgment of acquittal but thinks it more advisable to reserve the argument on it until the end of the case and then an argument on all the evidence and on the merits that could be made at one time. If the Court is agreeable to that, the defendant will then call the clerk of the Board as the first witness.

LILLIAN Z. SEARLE

called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: State your full name for the record.

A. Lillian Z. Searle.

Direct Examination

Mr. Tietz: Q. May I ask if it is Miss Searle or Mrs. Searle? A. Mrs.

(Testimony of Lillian Z. Searle.)

Q. Mrs. Searle, you were the clerk of the Board—what number? A. 23.

Q. For how long, approximately?

A. Well, from about January of '52.

Q. How many different advisors to registrants did you have during that period?

A. Well, the clerk acts as—— [6]

Q. Now, you are familiar with the regulations to some degree, are you not? A. Yes, I am.

Mr. Foster: Well, if Your Honor please, I think the witness has a right to answer the question.

The Court: Yes. That is, I think that you are entitled to get the information you desire, Mr. Tietz, but if she has some explanation to make of her answer, then she can do so.

So I suggest that you answer the question. Now the question is, were there any advisors appointed by the Board during this period of time?

A. Well, the Board members always act as advisors. The coordinator acts as an advisor. And there is an appeal agent that acts as an advisor, and——

Mr. Tietz: Q. There are many roving colonels that come visiting you and many people from state headquarters, and all the people in state headquarters in Sacramento and the assistant United States attorneys; in fact, there are many people who, if asked, would be happy to give a few minutes' time to a young registrant; correct?

A. I suppose so.

Q. Part of your work is to have a degree of

(Testimony of Lillian Z. Searle.)

familiarity with the Selective Service regulations, is that correct? A. Correct.

Q. That in a way is the bible that you operate by, right? [7] A. Right.

Q. And Section 1604.41 specifies that a certain official known as "Advisor to Registrants" is to be appointed, right? A. Right.

Q. Do you have any?

A. Well, the appeal agent——

Q. Please. We know you have lots of functionaries.

Mr. Foster: If Your Honor please——

The Court: Don't argue with the witness, Mr. Tietz. Has anybody been appointed, as far as you know, to fill the position of "Advisor to Registrants" specifically?

A. Well, all the board members act as advisors because they will see them at any time.

The Court: Well, you have already said that. But the only question I want to know, has any particular person been appointed with the title or with the category "Advisor to Registrants" so far as you know?

A. Not outside of what I mentioned.

The Court: In other words, your answer is that these other persons, that is, the board members and the appeal agent, act in that capacity, is that correct? A. Yes.

The Court: But no specific person otherwise has been appointed? A. That's right. [8]

(Testimony of Lillian Z. Searle.)

The Court: All right. Now then, do you have any further questions?

Mr. Tietz: Yes, sir.

Q. At any time have you or your Board or anybody on behalf of your Board ever posted in the office of the local board a notice giving the names and addresses of advisors to registrants or that anyone would substitute in their place and that free advice could be obtained from them, giving the names and addresses of such persons?

A. Well, I give that when the boys ask.

The Court: But he wanted to know, has a notice ever been posted?

A. No.

Mr. Tietz: That's all.

Cross Examination

Mr. Foster: Q. As a matter of fact, on your desk you have the names of certain people, don't you?

A. Yes, I do, the Board members and the appeal agents' names and address and phone number.

Q. Where is your desk?

A. Well, it's about two desks behind the counter. You can see it as you come in.

Q. You can see it as you come in?

A. Yes.

Q. And this list of names that you refer to is on top of your [9] desk, isn't it?

A. Yes, it is.

Q. And whose names are on that desk?

(Testimony of Lillian Z. Searle.)

A. The list of the Board members and the appeal agent.

Q. Do you know the defendant, Mr. Uffelman?

A. Yes, I do.

Q. For how long a period of time have you known him?

A. Ever since I have been on the Board.

Q. Are you familiar with his Selective Service file? A. Yes, I am.

Q. Do you recall any case where the regulations allowed it, that the defendant did not request and obtained a personal appearance?

Mr. Tietz: I object. We are only concerned with this case.

The Court: I will overrule the objection. For whatever the testimony is worth, I will hear it.

A. No, he has never been refused any personal appearance.

Mr. Foster: Q. That is, has there been any case in which he has asked one and hasn't received one?

A. No.

Q. Now, when he has been retained in a classification by a personal appearance, is there any case that you know of that he has not taken the appeal?

A. No. [10]

Q. Now, has he ever submitted material to you for inclusion in his file? A. Yes, he has.

Q. You say that was on few or many occasions?

A. Many occasions.

Q. Has anyone ever refused him the opportunity to submit this material? A. No.

(Testimony of Lillian Z. Searle.)

Q. Now, has he ever asked you questions as to his rights under the Selective Service Act?

A. Well, I am sure he has.

Q. You don't remember specifically at any time?

A. No.

Mr. Foster: No further questions.

Mr. Tietz: I would like to ask a few questions in connection with what Mr. Foster was asking.

Redirect Examination

Mr. Tietz: Q. Is it not a fact that on December 8, 1953 this defendant had what is called an appearance before local board with your local board? Would you like to look at the record to make certain? A. Yes, I would.

The Court: Would you hand her the records so she can look at them, Mr. Tietz?

(Witness examining.) [11]

A. Yes, on December the 8th, 1953 he did have a personal appearance.

Mr. Tietz: Q. Didn't he come to that personal appearance with two friends who knew him for a considerable length of time, a Mr. Brese, who had been a minister for 40 years and 30 years a resident of Sacramento, and a Mr. Hendrickson, of 20 years, and wanted them to testify for him at that meeting? A. I don't remember.

Q. You remember the date or the incident?

A. I don't remember if there were any witnesses with him.

(Testimony of Lillian Z. Searle.)

Q. Then you do not know whether he was forbidden to introduce such oral testimony?

A. No.

Mr. Tietz: No further questions.

Mr. Foster: No questions.

The Court: All right. Thank you. You may step down.

(Witness excused.)

Mr. Tietz: The defense will call the witness Col. Ferrill.

GEORGE R. FERRILL

called as a witness on behalf of the defendant, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Clerk: State your full name for the record.

A. George R. Ferrill. [12]

Direct Examination

Mr. Tietz: Q. Colonel, you are connected with the California Selective Service System?

A. That's correct.

Q. Does your territory include, your jurisdiction, include local board 23? A. It does not.

Q. Would you have any knowledge as to whether or not any advisor has ever been appointed for advisor to registrant as provided in 1604.41 for that Board? A. I would say not.

Q. You mean you are satisfied none was ever appointed?

(Testimony of George R. Ferrill.)

A. As far as I know, none was appointed in the State of California.

Mr. Tietz: Thank you.

Cross Examination

Mr. Foster: Q. Mr. Ferrill—Col. Ferrill—Section 1604.41 provides as follows, does it not, that “Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other Selective Service forms and to advise registrants on other matters relating to their liability under the Selective Service law”—isn’t that the substance of the regulation? [13]

A. That’s correct.

Q. And your experience as a Selective Service official, can you tell us whether in the State of California persons who have been appointed by the Selective Service to advise and assist registrants—persons have been appointed by the Selective Service to advise and assist registrants in the preparation of questionnaires?

A. There were such people appointed during the 1940 Act, yes.

Q. Well now, under the present act are there persons in the Selective Service Board who advise registrants in the preparation of questionnaires?

A. The local board clerks, yes.

Q. And are there persons in the Selective Serv-

(Testimony of George R. Ferrill.)

ice System who advise registrants on other Selective Service forms?

A. The government appeal agent is available to them.

Q. And the clerk of the local board?

A. The clerk of the local board, as well as the board members.

Q. Now, you have an official called the coordinator at the local board? A. That's right.

Q. Are they available for the purpose of assisting in the preparation of Selective Service forms?

A. Well, the coordinator of the local board is one of the compensated staff within the Board. She is the supervisor of the local board group, in addition to the clerks. She is [14] available to answer any question, yes.

Q. Are there any persons who are there for the purpose of advising registrants on other matters relating to their liability under the Selective Service law? A. You mean in the Board?

Q. Well, connected with the Board.

A. The government appeal agent, yes, and the Board members.

Q. What is a government appeal agent?

A. The government appeal agent is an adjunct which was set up for the Board for the purpose of looking out for the interests of the government as well as the interests of the registrant.

Q. What are the qualifications for a government appeal agent?

Mr. Tietz: I will object to the line of questioning,

(Testimony of George R. Ferrill.)

if Your Honor please. It is going far afield, not going to be one of the issues in the case, and, furthermore, the regulations very specifically set all this forth, and the Court can take judicial knowledge of Section 1604.41 as the regulation.

The Court: What's the reason for going into all of this?

Mr. Foster: Well, if Your Honor please, I think that this regulation has been complied with.

The Court: Which regulation?

Mr. Foster: 1604.41.

The Court: Mr. Tietz' statement is that the function of the government appeal agent is set forth in regulation 1604.41.

Mr. Foster: There are some possible facts that I want to set out. I want the facts before the Court as to actually how those persons operate in the State of California. What name they are called by seems to me to be another question.

The Court: I will overrule the objection but this doesn't seem to me to—. If you are asking for their duties under this section, if you are asking what they do otherwise, well, that's another thing.

Mr. Foster: Q. What are their qualifications in the State of California?

A. In the State of California they must be an attorney.

Q. Were there attorneys to advise registrants under the 1940 Act?

A. Yes, they were government appeal agents, if that is what you mean.

(Testimony of George R. Ferrill.)

Q. Government appeal agents? A. Yes.

Q. With the particular title that was called "Advisor to Registrants" during the 1940 Act, were they attorneys? A. No.

Q. They weren't attorneys?

A. It could be that some were but ordinarily they were laymen.

Q. For what purpose were those persons utilized under the 1940 Act?

A. Primarily for the purpose of assisting them in making out [16] their questionnaires.

Q. And was your Selective Service work load greater during the 1940 Act than it is at the present time?

A. Yes, three to four times more.

Q. Have you any idea of how many more Selective Service fulltime employees you had then than you have now?

A. Well, that would be hard to answer, that question, exactly. Of course, our employees were engaged by the amount of work that we had. We had around 45 million registrants under the 1940 Act. We have about 15 million under this Act.

Q. I see.

A. So the personnel in the local boards fluctuated.

Q. Would you say that on the average there is more personnel under the 1940 Act—there was then—within a local board than there is at the present time? A. A great deal more, yes.

(Testimony of George R. Ferrill.)

Q. Do the clerks double up on their duties from time to time on the local board?

A. They do now, yes.

Q. And during World War II you had specialists to do the work?

A. More or less, yes.

Mr. Foster: No further questions.

Redirect Examination

Mr. Tietz: Q. Colonel, you are aware that on January 31, [17] 1955, by executive order 10594 the President amended Section 1604.41 and made the appointment of registrars permissive instead of mandatory?

A. I know that it was clarified by executive order, yes.

Q. Isn't that the substance of it, it was made permissive and not mandatory?

A. It was never taken the position that it was mandatory in the first place.

Q. I see. Since you have been asked about appeal agents, I will ask if that same executive order didn't clarify Section 1604.41 and add the words concerning the duties of the appeal agent, "brought to his attention"?

A. I haven't seen the executive order, Mr. Tietz; I don't know.

Mr. Tietz: That is all.

Mr. Foster: No further questions.

(Witness excused.)

The Court: What is the number of that executive order?

Mr. Tietz: 10594.

The next defense witness will be the defendant himself.

WESLEY LAWRENCE UFFELMAN

the defendant herein, called as a witness in his own behalf, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: [18]

The Clerk: State your full name for the Court and the record.

A. Wesley Lawrence Uffelman.

Direct Examination

Mr. Tietz: Q. You have had one or more appearances before your local board, have you not?

A. Yes, I have.

Q. At the December 8, 1953 appearance you brought Mr. Hendrickson and Mr. Brese with you, did you not? A. Yes, I did.

Q. Why did you do that?

A. I felt that it would help me, it would help the draft board to understand my activities as a minister.

Q. How long have they been in the work that is done by Jehovah Witnesses?

A. Mr. Hendrickson has been a minister for about 20 years and Mr. Brese about 40 years, and they both hold special positions in the congregations in Sacramento.

The Court: Is that Hendrickson? A. Yes.

(Testimony of Wesley Lawrence Uffelman.)

Mr. Tietz: Q. How long had they known you at that time in December of 1953?

A. Ever since I first learned of this, became part of the religion, and that was in 19— around 1944 somewhere, and I became very familiar with them in the years 1948 and '49, [19] beginning—

Q. Are we to understand that you and they were in Sacramento during all this time? A. Yes.

Q. And that you and they had frequent contact?

A. Yes.

Q. Did you work together?

A. Yes. Mr. Hendrickson is the congregational servant and—

Q. Would you tell us—excuse me—what that means?

A. Well, that the congregational servant is in charge of the congregation and he is in charge of the servant body, which consists of about seven servants.

Q. Proceed, please. A. And—

The Court: Is that now called congregational servant instead of company servant?

A. Yes, sir.

The Court: It formerly was company servant, is that correct? A. Yes.

Mr. Tietz: Q. Now, when you came to this Board meeting with these two gentlemen, did they get to come in and testify for you?

A. No, they weren't allowed to come in. We went into the office and we waited there until the time for the meeting to [20] start, and when I was

(Testimony of Wesley Lawrence Uffelman.)

asked before the Board then I told them I had these two friends out there and asked them if I could invite them in and give testimony, and they said that the time was limited to about 15 minutes, that they could limit the time to that.

Q. Did they actually limit the time to 15 minutes?

Mr. Foster: Well, I object to that as argumentative.

The Court: I will overrule the objection.

Mr. Tietz: Q. How much time did you actually have before the local board at this time?

A. About 15 or 20 minutes.

Q. If you had been given more—. Did you have material with you to present to them, subjects to cover, that would have taken more than that time?

A. Yes. At the very beginning I pointed out that I had information here typed out and that I would like to read it to them and explain it, and they asked me if I would condense it in order to save time.

Q. Then are we to understand that although they accepted your typed-out information, they did not give you the time to discuss it and explain it?

A. That's right, fully.

Q. All right. If you had more time, what would you have done at that meeting by way of a discussion or explanation?

A. Well, I would have explained chiefly my duties as a [21] minister in the congregation and elaborated on the time schedule that I had outlined,

(Testimony of Wesley Lawrence Uffelman.)

explaining in detail the work that was involved and the time that was involved in doing this.

Q. Would you have explained what the publishing means? A. Yes, I would have.

Q. And in a way that you didn't present in any of your written material? A. Yes.

Q. Would you have explained back calls?

A. Yes.

Q. Would you have explained the home studies?

A. Yes.

Q. Would you have explained the other studies that you regularly engage in?

A. Yes, sir, I would.

Q. Now, among other things you presented to the local board at one time a copy of the February 1951 issue of Watchtower. What is Watchtower?

A. The Watchtower is a bible of study aid magazine and which we use in studying the Bible and aiding people to study the Bible. It explains the Scriptures and——

Q. Is it an official publication of your society?

A. Yes, it is.

Q. What is the name of the society?

A. It is the Watchtower Bible and Tract Society.

Q. And where is its principal office?

A. It is in New York.

Q. In Brooklyn, New York?

A. In Brooklyn, New York.

Q. And the Watchtower comes from there, does it not?

(Testimony of Wesley Lawrence Uffelman.)

A. Yes. They have a factory there.

Q. Now, this issue of February 1st, 1951 explained the position of the society on the subject of why Jehovah Witnesses are not pacifists, did it not?

A. Yes.

Q. How did it explain it?

A. Well, it mentioned that Jehovah Witnesses were not pacifists but yet conscientious objectors, impartial in war among nations.

Q. Did it explain why if they were not pacifists that they were still religious objectors to war?

A. Yes, it did.

Q. In what way did it explain it?

Mr. Foster: I am going to object to this, since this defendant was classified 1-O I don't think it makes any difference whether there was any material included in his file or not included in his file concerning that subject. It couldn't conceivably have been prejudicial.

Mr. Tietz: Your Honor please, if I may be permitted to argue the matter now, to save time later. On the subject there [23] are two points that are involved on this factual basis. If the Court would like to hear me now, I would like to proceed.

The Court: Yes.

Mr. Tietz: The first point I want to make is this, it is my contention that since the regulations prohibited an attorney to accompany a registrant at one of these hearings that the Court now is confronted with what I would choose to call a dilemma that the Court may easily resolve, but I look at it

(Testimony of Wesley Lawrence Uffelman.)

this way: here is an individual who as the result of a record made in an administrative proceeding is facing a federal felony charge. Now obviously in this court he is entitled to the benefit of counsel, and he gets it. There wouldn't be any question about that. It can be said that it is consonant with the due process to deny a defendant who was a subject before an administrative body counsel before that administrative body, but if the record that is made there is to be the sole record on which he is to be tried on a criminal case, then in that criminal case today, right now, he should be permitted to go into the matter *de novo*. Now of course there is authority which can be construed completely contrary to this idea, *Cox vs. The United States*, Supreme Court case, 1946. But it seems to me that at one place or other he is entitled to a record that is made with benefit of counsel. He either should have the opportunity before the administrative system to have a lawyer to build the record on which his [24] liberty later depends or today he should be able to go into the whole matter *de novo*. That is my one point on that.

The Court: All right. Let's hear your second one, then.

Mr. Tietz: Now my second point is this. He presented evidence. We have the exhibit which is in evidence which doesn't give all of that—. Has the Court a copy of that?

The Court: I don't have it with me now.

Mr. Tietz: Can I hand the Court—

(Testimony of Wesley Lawrence Uffelman.)

The Court: I have it here.

Mr. Tietz: Now the evidence isn't all there. If the Court will look at page 34, the Court will find that it isn't all there.

Mr. Foster: What?

Mr. Tietz: Look at 34.

The Court: 34 has the face of the Watchtower. I am looking at the page numbers that are circled at the bottom.

Mr. Tietz: Yes, sir. That's it.

The Court: Then it goes on with——

Mr. Tietz: Well, that's my point, Your Honor, and I submit it. If the Government wishes to convict him on that type of record——

The Court: Well, what? The thing I'm trying to find out, what isn't there?

Mr. Tietz: Well, very possibly——

The Court: It says, "This pamphlet consists of pages [25] 67 to 96" written in pencil at the bottom of it.

Mr. Tietz: Well, let me ask the witness a question or two.

Q. You testified that you submitted for consideration by the Selective Service System the Watchtower of February the 1st of 1951, is that correct?

A. Yes.

Q. Did you submit just the front page or did you submit a whole booklet, or what?

A. I submitted the whole Watchtower because——

Mr. Foster: Well, if the Court please, to over-

(Testimony of Wesley Lawrence Uffelman.)

come the problem perhaps I should put the original file back in evidence. What the Court has before it is the photostatic copy which apparently did not copy all the Watchtower, and here is the Watchtower in the original file.

Mr. Tietz: The problem goes further than that. The certificate on the front of the exhibit says that it is a full, true and correct exhibit. Now we have a problem. Now, which is correct? Was this ever sent up to the appeal board when they passed on his ministry? Now I would like to be heard for two or three minutes so you will see the point.

The question is not—my point—the question is not was he a conscientious objector, but the question is this. He claimed at every stage of his processing that he was a minister. He was attempting to show that he was a conscientious objector because he was a minister, not because he was a pacifist, not because he was a philosophic objector, not because of some purely moral code but because of his being a minister. Now, when they admit that he is——

The Court: Let me see if I understand you correctly. Wasn't he claiming also to be a minister of the gospel under that classification?

Mr. Tietz: The last expression of the Court I don't quite understand.

The Court: Wasn't he claiming to be a minister of the gospel so that he would be exempt from military service instead of being classified as a conscientious objector?

(Testimony of Wesley Lawrence Uffelman.)

Mr. Tietz: Yes.

The Court: Then he makes the statement that he also claims to be a conscientious objector because he is a minister.

Mr. Tietz: Correct. That is the sole basis for it.

The Court: That is a different classification than minister of the gospel.

Mr. Tietz: Exactly.

The Court: Is it your position that he was denied anything in that respect?

Mr. Tietz: Oh, yes.

The Court: He was classified as a conscientious objector and given the lowest conscientious objector classification, or highest, whichever way you want to call it. [27]

Mr. Tietz: Lowest.

The Court: Lowest one that could be given. Now, how was he prejudiced?

Mr. Tietz: Because the 4-D minister's classification is lower, and——

The Court: That is not a conscientious objector classification.

Mr. Tietz: No. Let me finish with my two or three minutes of argument and the Court will see my point.

The Selective Service System is required to classify each registrant in the lowest classification for which his evidence fits him, and 4-D is concededly lower than the conscientious objector classification.

The Court: Yes, it is another classification.

Mr. Tietz: Yes.

(Testimony of Wesley Lawrence Uffelman.)

The Court: It is a completely exempt classification.

Mr. Tietz: Yes. Now when his evidence, which this was the chief part, this was the official part showing that the reason for his conscientious objection was solely his ministry, solely his ministry, not pacifism as it is with many other denominations, not his personal code and so on, but it was solely his ministry, and then the Board and the appellate system comes along and concedes that he is telling the truth, concedes that it is right, that he is a conscientious objector, the only legal basis they could have put it on was his [28] ministry. If that is true—see, I am making some fairly big jumps in my reasoning, but I go back and fit them in.

The Court: I follow you so far.

Mr. Tietz: But if that is true, as I argue that, it is implicit in the finding of 1-O in his case and practically every Jehovah Witness case, that it is because of his ministry and nothing else, then they are conceding that he is a bona fide minister.

(Further argument.)

Mr. Foster: Well, if the Court please, apparently there has been some difficulty about this photostatic copy. I might say, and I will prove in rebuttal, that the original copy goes to the appeal board, and at this time I would like to offer to substitute the original back for the photostat, if there is any question about the completeness of the photostatic copy. This Watchtower magazine referred to by counsel is in the original file.

(Testimony of Wesley Lawrence Uffelman.)

The Court: Yes, it is, in full. And the photostatic copy containing the front page also refers to certain pages of the pamphlet, without having them photostated. Now that pamphlet is an issue—probably there were a number of copies published—and whether or not they saw fit to photostat the issue to send along or sent another copy, is another question. But the proposition you are going to make anyway is that the original file was forwarded in toto and that this photostatic copy, while it is substituted——

Mr. Foster: This photostatic copy was made up purely for the convenience of the Court in this trial and for the convenience of the United States Attorney.

The Court: If there is a problem, you may substitute the original and see that it is there so that it will be in the file.

As a matter of fact, what you can do, Mr. Clerk, mark that, the original, and we will just keep this photostatic copy as a photostatic copy of the portion of it, and the original will be in evidence and it will be Exhibit 1—the original will be Exhibit No. 1, and this is just a copy of Exhibit 1.

Mr. Tietz, in any event, I am going to have to—if that's the purpose of this testimony—in other words——

Mr. Tietz: That's half of it.

The Court: Let's hear the other half.

Mr. Tietz: The other half——

The Court: I will have to sustain the objection

(Testimony of Wesley Lawrence Uffelman.)

on this half of it. In other words, I don't think that you are entitled at this stage of the proceeding to go behind the administrative record except to the extent that it would show that this man—would go to something definite that had to do with whether or not he got due process or whether or not he had some right or privilege denied him. I am not here to [30] re-try whether the draft board properly or improperly classified him. My only purpose here is to determine whether or not he was given due process in that classification and whether or not there was a basis in fact for the classification which was so made. Those are the only two things I have before me.

Mr. Tietz: That perhaps takes care of the other half, too, which was my argument that he should be able *de novo* in this court to go into the whole matter.

The Court: I will deny that.

Mr. Foster: If Your Honor please, I would like to make one objection for the record so I can't be caught with having waived it if this matter goes on appeal, and that is I am going to object to the introduction of any evidence in this case other than that concerned with his reporting for induction or reporting to work, on the issue in the indictment, on the grounds that—

The Court: That he failed to exhaust his administrative remedies?

Mr. Foster: Failed to exhaust his administrative remedies.

(Testimony of Wesley Lawrence Uffelman.)

The Court: Well, that objection will be noted for the record. But the objection is sustained, in any event, because I am not going to re-hear all of that matter, Mr. Tietz, and you have made your point now and you can go forward. If there is anything that goes to basis in fact or to procedural due process or due process, I will hear it, but I am not going to hear anything else.

Mr. Tietz: I will not—well, not to argue with the Court, but the basis in fact would be the whole situation.

The Court: That may well be true.

Mr. Tietz: I have only one more point that I could cover with this witness.

Q. You had occasion to visit your local board office many times, I believe? A. Yes, I did.

Q. And when you were there did you have occasion to look at the bulletin board? A. Yes.

Q. Were any things posted on the bulletin board? A. Yes, there were.

Q. What kind of things?

A. Oh, there was one I remember, a piece of paper showing the different classifications.

Q. Of the different registrants, you mean?

A. Yes.

Q. Did you ever see anything which said, "The following are the names and addresses of advisors to registrants", giving you free advice or anything like that? A. No, I never. [32]

Q. If there had been something there, would you have seen it? A. Yes, I believe I would.

(Testimony of Wesley Lawrence Uffelman.)

Cross Examination

Mr. Foster: Q. You remember everything that was on that board from the first time you registered?

The Court: Now, Mr. Foster, I don't think there is any necessity of going into it. You know there is none posted and there is no use in cross examining the witness on that subject. Both the clerk and Col. Ferrill have testified that there weren't any such, and it is immaterial to me whether he saw it or didn't see it because there wasn't anything there.

Mr. Foster: Q. Well now, Mr. Uffelman, are you familiar with where the desk is of the clerk of the local board? A. Yes, I am.

Q. Where is it?

A. Well, on entering it is over to the left about two—

Q. Have you ever gone to that desk and discussed matters with the clerk of the local board?

A. Yes, I did at one time.

Q. At one time? A. Yes.

Q. And where you were sitting right next to the desk—did you sit down next to the desk and discuss the matters that you had with her or did you stand up and talk to her?

A. I sat at the desk and copied things from my file. I wasn't [33] particularly interested—

Q. Did you notice on the desk there the names of the government appeal agent and of the local board members? A. No, I never.

(Testimony of Wesley Lawrence Uffelman.)

Q. Did you look?

A. No, I never looked.

Q. You didn't look, you didn't look over—. Did you notice any papers on her desk that were attached to the desk?

A. Well, that was way back in 1951.

Q. You weren't particularly looking for that?

A. Not at that time, no.

Q. Now, you appealed from your original classification 1-A, didn't you? A. What was that?

Q. When you were first classified 1-A back in—what, 1951?— A. Somewhere in there.

Q. You appealed from that?

A. Yes, I did.

Q. Did anybody advise you to appeal?

A. Well, I knew that I should appeal.

Q. How did you know?

A. Within ten days. It is on the SS form.

Q. It is right on the form that tells you you should appeal? A. Yes.

Q. Did you get a personal appearance at that time? [34]

A. Yes. I asked for a personal appearance.

Q. How did you know that you were entitled to a personal appearance? Did somebody tell you?

A. Yes, I had been told. I have a copy of the Selective Service regulation.

Q. Who was it that told you.

A. Who was it that told me?

Q. Yes.

A. The legal counsel for Jehovah Witnesses.

(Testimony of Wesley Lawrence Uffelman.)

Q. I see. Now, have you consulted with the legal counsel of Jehovah Witnesses from time to time during your classification period?

A. Yes, I have.

Q. On that last classification you received, did you consult with him at that time? A. Yes.

Q. What was that counsel's name?

A. Hagen C. Covington.

Q. And he is from New York City, is that correct? A. Yes.

Q. Now on direct examination you discussed an appearance before the local board. When did that appearance take place?

A. You have reference to the one in December?

Q. You were discussing some matters that you brought two witnesses—— [35]

A. Yes, that was December 8.

Q. What year? A. 1953.

Q. 1953? A. Yes.

Q. You received a personal appearance in March, did you not?

The Court: '54.

Mr. Foster: Q. '54.

A. '54. Well, I received a personal appearance to discuss a particular job.

Q. That was on March 9, 1954?

A. Possibly. Well——

Q. Wasn't it?

A. I think it was on the 8th. And I submitted a memorandum as to what took place the 9th.

Q. That's right. All right. Now, did you bring

(Testimony of Wesley Lawrence Uffelman.)
any witnesses at this time? Perhaps if I showed you your memorandum of what happened there that would refresh your recollection (handing to witness).

A. All right (examining document). I believe I brought Mr. Hendrickson, but he didn't come in.

Q. You didn't ask the Board to examine him at that time? A. No.

Q. And the other time you brought two friends with you? A. Yes. [36]

Q. What did you say to the local board about it?

A. I told them that I had Mr. Hendrickson and Mr. Brese waiting and that I would like to have them come in.

Q. Is that all you said?

A. And that they could verify the things that I had to say were true.

Q. Did you tell the Board they were friends of yours?

A. I told them that they were—that Mr. Brese was a minister in Sacramento for 30 years and that Mr. Hendrickson was the city congregational—in charge of the city congregations.

The Court: What was that name, Brese?

A. Brese.

The Court: B-r-e-s-e.

A. Yes.

Mr. Foster: Q. You have a full time job at the present time, do you? A. Yes.

Q. What is that?

A. I am a hod carrier.

(Testimony of Wesley Lawrence Uffelman.)

Q. Were you a hod carrier during the time that you were classified 1-O this last time?

A. Yes, I was.

Q. Your position in the church at that time was advertising servant, was it not?

A. Yes, and it still is. [37]

Q. You are still what is known as advertising servant?

A. Yes. And I have been appointed also the territory servant in charge of——

Q. I noticed you submitted a sort of a resume of what the organization of your church was, didn't you? You listed the number of servants——

A. Yes.

Q. As I recall, advertising servant was about fourth or fifth on the list.

A. Yes, it's something like that.

Q. You listed them——

A. I just listed them according to——

Q. According to their importance?

A. No, not necessarily.

Q. Well, the congregational servant is the most important member of the congregation, isn't he? Isn't he the leader?

A. He is the leader. There are three, the congregational servant and the assistant and the Bible study servant, they are the three that are more or less in charge.

Q. And you are the advertising servant and you come below them, is that right? If something needs to be done, they tell you what to do? You don't

(Testimony of Wesley Lawrence Uffelman.)

tell them? A. Yes, I discuss it with them.

Q. How big a congregation do you have?

A. At the present time we have about 97 that are—what I [38] mean by that, those that are active in it.

Q. Active in the work?

A. We have many people of good will. They are associated at times.

Q. Now as advertising servant you are in charge of the literature, aren't you?

A. The magazine.

Q. The magazines. And do you assist persons—do you assign persons out to sell the magazines, and so forth, and keep them supplied with magazines?

A. I don't assign them out. I am just in charge of the magazines and they come to me in my name at the congregation, and I see to it that they are able to get the magazines if they so desire.

Q. In other words, you don't tell the people where they are to sell the magazines, you just take care of the magazines themselves?

A. That's right.

Q. Who does tell the people where to sell the magazines?

A. Well, we have certain territory within our congregation's boundaries, and there are many congregations in Sacramento, and we have a certain boundary and I am now in charge of the territories, and I distribute these territories, such as those that want them would come in and ask and we try to regulate them close to their homes and close to

(Testimony of Wesley Lawrence Uffelman.)

our service centers. [39] We have service centers which are located throughout the city in various homes.

Q. Do you deliver the magazines yourself?

A. No. We have the little room in back where they come to.

Q. Oh, they just come and get it. Are you stationed back there most of the time?

A. Yes, I am back there before and after the——

Q. You help them when they come in and bind up the magazines for them?

A. Sort of a post office affair.

Mr. Foster: I see. No further questions.

Redirect Examination

Mr. Tietz: Q. Mr. Foster keeps using the word "selling the magazines". Do you have any comment that will clarify that to us? Are the magazines sold?

A. No, they are not. There is a small contribution asked for the magazines which is merely to cover the cost of printing. However, there is no financial gain involved on the individual's part. They do that voluntarily and they do it solely for the purpose of furthering Bible education, because in the magazine is contained a systematic way of studying the Bible and for the purpose of going house to house and introducing the magazine and asking them to study it and asking a small contribution of five cents for the magazine, and if they can't contribute we always leave them free.

(Testimony of Wesley Lawrence Uffelman.)

Q. Thank you. Now Mr. Foster asked you about the congregation, of which there are 97 active missionaries and ministers——

The Court: Mr. Tietz, we are past recess time. I will take the morning recess and we will go on with the testimony. I don't anticipate it will take much longer.

Mr. Tietz: Three more minutes of this and we are through.

The Court: Well, but you will want to argue the matter. So we will take the recess.

(Short recess taken.)

Mr. Tietz: Q. You were asked by Mr. Foster about your congregation of 97 ministers. Do each of those ministers have any other congregation?

A. Yes.

Q. What is it?

A. It's the homes of the people.

Q. Do they have territories or do they just go wherever they feel like?

A. They have territories that we assign to keep it organized so that it is worked—the whole city is covered systematically.

Q. So they each have two congregations, the one of the congregation of ministers and the one of the congregation of laymen to whom they regularly preach?

A. Yes.

Mr. Tietz: That is all. [41]

Mr. Foster: No further questions.

(Witness excused.)

Mr. Tietz: The defense rests.

The Court: Any rebuttal?

Mr. Foster: Yes, Your Honor, one witness.

GEORGE R. FERRILL

called as a witness on behalf of the Government, in rebuttal, having been previously duly sworn, testified further as follows:

Direct Examination

Mr. Foster: Q. Colonel, would you say once again your position in the Selective Service System?

A. I am the personal representative of the state director in this area, commonly known as the coordinator.

Q. Are you familiar with Selective Service appeal procedures? A. Yes, I am.

Q. Can you tell us whether or not the original Selective Service file is sent to the appeal board from an adverse situation in the local board?

A. Yes.

Mr. Tietz: I wish to make an objection in that the usual procedure is not what concerns us but what concerns us in this particular case.

The Court: Overrule the objection. Are you going to produce the person who personally sent it? Is she here? [42]

Mr. Foster: Yes.

The Court: Proceed.

Mr. Foster: Q. Do you know when, in the usual case, the photostatic copy of the record is prepared?

(Testimony of George R. Ferrill.)

A. Well, photostatic copy is prepared before the indictment is returned.

Q. Is it prepared in the usual Selective Service case that does not result in indictment?

A. It is prepared before it is presented to the Grand Jury.

Q. Before the Grand Jury? A. That's right.

Q. But in a case where a matter is merely appealed but there is no criminal action or possibility of criminal action, is a photostatic copy of the file made? A. No.

Mr. Foster: No further questions.

Cross Examination

Mr. Tietz: Q. Has it not come to your attention on some occasion that a registrant will order a photostatic copy of the file long before any criminal action is in view?

A. He might order it from state headquarters. He wouldn't order it from my office.

Mr. Tietz: That is all.

Mr. Foster: No further questions.

(Witness excused.) [43]

LILLIAN Z. SEARLE

called as a witness on behalf of the Government, in rebuttal having been previously duly sworn, testified further as follows:

Direct Examination

Mr. Foster: Q. Mrs. Searle, are you the clerk

(Testimony of Lillian Z. Searle.)

of Local Board 23?

A. Yes, I am.

Q. Can you tell whether or not you transmitted the Selective Service record or file of Wesley Uffelman to the appeal board from the local board?

A. Yes, the complete file.

Q. And did you transmit to the appeal board a photostatic copy or the original record?

A. No.

Q. Was a photostatic copy of that record prepared at that time?

A. Well, I don't know if it was prepared but it always stayed in the local board office until it is presented in court.

Q. Following this defendant's last appeal, was a full photostatic copy prepared of this record that was sent to the appeal board?

A. There are photostatic copies of the whole file.

Q. There are now? A. Yes.

Q. Were there then? [44]

A. No, I don't think there was a complete copy of the photostats at that time.

Q. There was a photostatic copy of the record that was presented on the prior indictment?

A. Yes.

Q. But there was no photostatic copy of the rest of the material? A. That's right.

Mr. Foster: No further questions.

Mr. Tietz: I ask that a bundle of photostatic copies of various sizes, most of them being 8½ by 11, some being 8½ by 13 or 14, some being—

(Testimony of Lillian Z. Searle.)

The Court: You don't have to describe them in sizes.

Mr. Tietz: Various sizes—be marked for identification.

The Court: All right, Defense Exhibit A for identification.

(Thereupon group of photostats was marked Defendant's Exhibit A for identification.)

Cross Examination

Mr. Tietz: Q. Mrs. Searle, will you please look over Defense Exhibit A and tell us when that was made, if you know?

A. Well, I believe this was made in 1953 before the registrant was classified 1-O. I'm not sure, but I believe that was it. I believe.

Q. Can you give us any explanation why it is not paginated, [45] why it differs in size?

A. Well, I don't believe this was made by our records depot. I don't know where this came from. But we don't usually. This is the first file I have seen with the cover sheet in this order. Ours usually come like that (indicating).

Q. Do you recall personally making up the file for transmittal to the appeal board on this defendant's second appeal?

The Court: Talking now about the second appeal, now. That's the one that's involved in this case.

A. No. The one that is involved in this case, under the 1-O?

(Testimony of Lillian Z. Searle.)

The Court: Yes.

A. Yes.

Mr. Tietz: Q. Would you like to have before you Government's Exhibit 1 (handing to witness)? During that period, that month or two at that time, did you have other appeals, administrative appeals, where registrants wanted an appeal to the appeal board?

A. Well, more than likely, I don't remember but probably did. I usually have them.

Q. Well, do you have a distinct recollection of getting the papers ready for the appeal board in this Wesley Uffelman case?

A. Yes. I handled all the records of the clerk. I do all the transmitting to the appeal board.

Q. Do you remember that you had other appeals at that time? [46]

A. No, I don't remember.

Q. Well, in this particular case do you remember the documents that you put in the envelope for transmittal to the appeal board? A. Yes.

Q. Well, how can you remember the documents of this case when you don't even recall the names or anything about the other appellate cases you had at the same time, the same month or two?

A. Well, this case has come up so often that I am a little more familiar with this case.

Q. Do you recollect that if all the papers that were sent to the appeal board were found by you in the cover sheets when you got the notice of appeal from this registrant?

(Testimony of Lillian Z. Searle.)

A. Yes, all the records remain in the cover sheet. They are never taken out.

Q. Then what does it mean, "getting the file ready for appeal"?

A. Well, we put the information in order according to date, and everything is in order with the cover sheet on top of the file, inside on top of the information in the file, with the letter of transmittal and a new appeal record.

Q. Do you mean that the file is not in chronological order at all times?

A. Well, it should be at all times, yes. [47]

Q. Well, was this file in chronological order when this defendant said he wanted to take an appeal?

A. Well, it should have been.

Q. I am just asking if it was. Do you recollect it was?

A. Well, the only time it would get out of order would be during a board meeting where perhaps the board members——

Q. That isn't my question. Do you recollect it was in order or it wasn't in order?

A. Well, I don't know.

Q. Do you recollect what you did to the file, if anything, before sending the whole thing off to the appeal board?

A. Yes. I have to go through it and check it and see that everything is in order.

Q. I am asking you what you did, not what you have to do, but what you did.

(Testimony of Lillian Z. Searle.)

A. I do that always so I know I did it on this case.

Q. You know you went through this file?

A. Yes.

Q. Did you change any of the papers in this file from one position to another position—that is, to get them in chronological order or for any other reason of your own? A. No.

Q. You mean you don't recall that you did it or that you didn't check?

A. No, I don't recall. [48]

Q. Do you recall at this moment what was in that file with respect to the documents that your registrant, Wesley Uffelman, gave the Board?

A. No.

Q. You know he gave a lot of little leaflets and such things? A. Yes.

Q. A lot of affidavits? A. Yes.

Q. And you have no independent recollection about any of those things? He gave a magazine, this one we have been talking about this morning. You heard us talk about this in court?

A. Those things all remain inside the file.

Q. Do you recollect at this moment that when you got this file together and sent it on that that magazine was there?

A. Yes, I would swear to it that it was there.

Q. What?

A. I would swear to it that it was there.

(Testimony of Lillian Z. Searle.)

Q. Do you remember that? You remember that but you don't remember about the other things, isn't that right?

A. Well, I know that all the information was there.

Q. Well, how did you know that there was supposed to be a magazine in that file? Does it say some place there in the summary or something that "I gave a magazine" or that "He gave a magazine"? [49]

A. Well, I don't know but I remember I reviewed the files so much that I do know that that particular magazine was there.

Q. You mean that it was there when you sent it up to the appeal board? A. That's right.

Q. Now, do you recall that the little leaflets were there about the meetings that he preached at?

A. Yes, they were all there.

Q. The original ones were all there?

A. Yes.

Q. How many were there?

A. I don't know.

Q. Well, if he gave ten and you found five, would you know that there were five missing?

A. No.

Q. Would you have any way of checking as to whether there were supposed to be ten?

A. No.

Q. Did you have any way of checking that there was supposed to be a magazine? A. No.

(Testimony of Lillian Z. Searle.)

Mr. Tietz: That is all.

Mr. Foster: No further questions.

The Court: That is all, Mrs. Searle, thank you.

(Witness excused.) [50]

The Court: Anything further?

Mr. Foster: No.

Mr. Tietz: I am ready to present my motion.

The Court: Will you make your motions?

Mr. Tietz: I am handing the clerk the original signed copy of the motion and giving Mr. Foster a copy of the motion.

(Thereupon motion for judgment of acquittal was filed with the Court.)

(Thereupon followed argument.)

The Court: I will set April 15, 9:30 a.m., for decision; and if the decision is adverse, we might as well proceed with judgment and sentence at that time and dispose of the whole thing. If it is not, if it is an acquittal, of course we won't have any further proceedings.

That will be the order in the matter.

(Thereupon the matter was continued to April 15, 1955, 9:30 a.m., for decision and further necessary action.)

[Endorsed]: Filed May 26, 1955.

[Endorsed]: No. 14780. United States Court of Appeals for the Ninth Circuit. Wesley Lawrence Uffelman, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: May 27, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14780

WESLEY LAWRENCE UFFELMAN,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S STATEMENT OF POINTS

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above entitled cause.

I.

Defendant was denied procedural due process in that the local board failed to have available an Advisor to Registrants and to have posted con-

spicuously, or any place, the names and addresses of such advisors, as required by the Regulations, and to the defendant's prejudice.

II.

The draft board lost jurisdiction to order appellant to report for induction because he was denied procedural due process of law in that the Department of Justice illegally deprived him of his right to an investigation, hearing, report and recommendation upon his claim for classification as a conscientious objector, contrary to Section 1626.25 of the Selective Service Regulations and Section 6(j) of the Act.

III.

The undisputed evidence and the draft board's records show that the local board deprived the defendant of his procedural rights to due process, at his personal appearance hearing before said local board, in that the local board abused its discretion by prohibiting defendant the opportunity to use a witness he brought with him, said witness being prepared to testify to material facts not then or thereafter a part of defendant's file.

IV.

The local board upon personal appearance deprived defendant of a full and fair hearing when it limited defendant to fifteen minutes to discuss further his claim for classification as a minister, which was in violation of his rights guaranteed by

the Regulations, the Act, and the Fifth Amendment.

V.

The order of the local board for defendant to perform civilian work at the Los Angeles County Department of Charities and sections 1660.1 and 1660.20 of the Selective Service Regulations are in conflict with the Act, because the work is not national or federal work as required by the Universal Military Training Service Act.

VI.

The Act, as construed and applied by the regulations and the order, calls for a private nonfederal labor draft for the performance of services that are not exceptional or related to the National defense, in violation of the Thirteenth Amendment to the United States Constitution.

VII.

Sections 1660.20 (d) and 1660.30 of Part 1660 of the Regulations are contrary to the First, Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

VIII.

There was no evidence that the work to which the Selective Service System assigned the defendant met the requirement of the law.

IX.

The Government has wholly failed to prove a

violation of the Act and Regulations by the defendant as charged in the indictment.

/s/ J. B. TIETZ

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 14, 1955. Paul P. O'Brien,
Clerk.

No. 14780

In the
United States Court of Appeals
For the Ninth Circuit

WESLEY LAWRENCE UFFELMAN,	}
<i>Appellant,</i>	
vs.	
UNITED STATES OF AMERICA,	
<i>Appellee.</i>	}

Appellant's Opening Brief

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FILED

OCT -5 1955

DAVID P. O'BRIEN, CLERK

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In the
United States Court of Appeals
For the Ninth Circuit

WESLEY LAWRENCE UFFELMAN, <i>Appellant,</i>	}	
vs.		
UNITED STATES OF AMERICA, <i>Appellee.</i>	}	

No. 14780

Appellant's Opening Brief

JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Northern District of California, Southern Division. The appellant was sentenced to custody of the Attorney General for a period of one year and one day. [R 12-13]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R 14]

*R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

Appellant was indicted under U.S.C., Title 50, App. Sec. 462 (Universal Military Training and Service Act) for refusing to do civilian work, as ordered. [R 3-4]

Appellant pleaded Not Guilty, [R 5] waived jury trial [R 6-7] and was tried on March 17, 1955. [R 7-] Appellant was convicted by Judge Oliver J. Carter on April 15, 1955, [R 12-13] and sentenced on the same day. [R 12-13]. At the close of the evidence, a Motion for Judgment of Acquittal was made and argued [R 61] and denied [R 12-13]. The motion contains all of the grounds that the appellant relies upon for reversal.

THE FACTS

Appellant registered with Local Board No. 23 and timely filed his eight page Classification Questionnaire on May 2, 1949. [Ex 5-]**

In it he showed he was born on February 11, 1930 and that he was "a student preparing for the ministry under the direction of Jehovah's witnesses." [Ex 7] He did not claim at that time that he was either a regular or an ordained minister. [Ex 7] He did not state what classification he should be given, at the place such an answer was invited [Ex 11] but he did state that he was studying "to better learn and qualify for

**Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

ministry." [Ex 11] He was single and working forty hours a week as a farmer. [Ex 8-9] He asserted that he was a conscientious objector, [Ex 11] was sent the four-page Special Form for Conscientious Objectors on June 27, 1949 which he completed and returned on July 1, 1949 [Ex 13-]; he was not classified until August 16, 1950; on that date was classified in Class IV-E, the then classification for the "complete" conscientious objector registrant. Class IV-E entailed no burden or obligation that would take Uffelman from his then, part-time ministry so he did not appeal. He was thereafter, on Nov. 14, 1951, reclassified by the local board into Class I-A. He had an appearance before his local board and claimed for the first time that he should have the IV-D minister's classification [Ex 168] because he had become a "pioneer" (that is, full-time) minister, [Ex 177]. He presented some documentary, corroborating evidence. [Ex 34-47] The local board kept him in Class I-A so he took an appeal. He received a I-0* from the appeal board. He appealed to the Presidential Appeal Board again detailing why he wanted the IV-D [Ex 82-84] but was put back in Class I-A by that body. He was ordered to report for induction into the armed services, refused to submit to induction, was prosecuted and acquitted. [Ex 12, 97]

After his acquittal the local board classified him in Class I-0. He asked for a personal appearance be-

*Class I-0 had become the new designation for the "complete" conscientious objector in 1951 and required 24 months of civilian work, as ordered by the local board.

fore the local board [Ex 95] and received one on December 8, 1953. [Ex 13] He brought two ministerial co-workers to this hearing, to testify for him but they were refused admission. [R 32-33] His classification was not changed by the local board, or upon appeal. Upon appeal his claim for reclassification was not given the "special appellate procedures." He was subsequently ordered to report for civilian work; he refused, was indicted and convicted.

At no time during appellant's selective service processing did the local board post the names and addresses of Advisors to Registrants.

QUESTIONS PRESENTED AND HOW RAISED

I.

The record shows that the local board never posted the names and addresses of Advisors to Registrants.

The question presented here is whether the failure to post the names and addresses of Advisors to Registrants is a denial of due process.

The question was raised by motion for judgment of acquittal [R 7-11] as were the following questions.

II.

The record shows that when the appellant perfected his administrative appeal he was not given the "special appellate procedure."

The question presented here is whether such procedures are the right of selective service registrants postured as was this appellant.

III.

The record shows that appellant was not permitted to bring witnesses to his hearing before the local board.

The question presented here is whether this was an abuse of discretion and of such gravity that it is a denial of due process.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

I.

Appellant was deprived of the Advisor to Registrants and this is a sufficient denial of a procedural right to constitute a denial of due process.

The trial court found that his local board did not post the names and addresses of Advisors to Registrants on the office bulletin board.

The law requires the posting [§1604.41 of 32 C.F.R.] and this Court has declared that failure to post presents a problem of due process. *Chernekoff vs. United States*, 219 F. 2d 721, 724. Also, it is so serious a departure that an administrative appeal doesn't cure the defect. *Ibid* and *Franks vs. United States*, 9 Cir., 1954, 216 F. 2d 266.

II.

When appellant was deprived of the special appellate procedures the Selective Service System lost jurisdiction to order him to report for civilian work.

The only reasonable interpretation of the Act of Congress is that it was intended that every registrant perfecting an administrative appeal involving a conscientious objection claim should have the special appellate procedures. Otherwise, the registrant denied the conscientious objector classification by the local board would have greater rights and opportunities than the one recognized as a sincere objector by the local board.

This Court has so construed the Act and the regulation in *Sterrett vs. United States*, 9 Cir., 216 F. 2d 659: "In view of what we here hold, not only was the Department of Justice in error in refusing to hold a hearing but so much of the Regulation as would purport to deny such a hearing to these registrants was itself unauthorized by the statute." [665]. Also see *Bates vs. United States*, 75 S. Ct. 529 and *De Moss vs. United States*, 75 S. Ct. 659.

III.

The appearance Before Local Board held on December 8, 1953 was unfair.

A hearing that doesn't give reasonable opportunity to present evidence is unfair. There is no adequate substitute for oral presentation when oral presentation is permitted. The regulation permitted oral presentation. The local board abused its discretion in refusing entrance to the two mature co-ministers who could have authoritatively corroborated appellant's testimony and aided him in the right given him by the regulation, namely, to discuss, argue, and point out the weight of material in his file. The cases dealing with this point support appellant's argument that the board abused its discretion.

ARGUMENT

I.

**APPELLANT WAS DEPRIVED OF THE ADVISOR
TO REGISTRANTS. THIS WAS A DENIAL OF
PROCEDURAL DUE PROCESS.**

It is indisputable that appellant's local board did not post the names and addresses of Advisors to Registrants. The Court so found:

“Cross Examination

“MR. FOSTER: Q. You remember everything that was on that board from the first time you registered?

THE COURT: Now, Mr. Foster, I don't think there is any necessity of going into it. You know there is none posted and there is no use in cross examining the witness on that subject. Both the clerk and Col. Ferrill have testified that there weren't any such, and it is immaterial to me whether he saw it or didn't see it because there wasn't anything there." [R 45]

Under the law, during all the period of appellant's selective service processing, it was essential to due process that the local board post the names and addresses of Advisors to Registrants.

At all times concerned, 32 C.F.R. §1604.41 read as follows:

“ADVISORS TO REGISTRANTS

1604.41 APPOINTMENT AND DUTIES.—

“Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the Selective Service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.”

On January 31, 1955 E.O. No. 10594 changed §1604.41 of the Selective Service Regulations by making the appointment of Advisor permissive instead of

mandatory. The change of one word in the regulation "shall" to "may" indicates a prescient anticipation of this Court's February 24, 1955 *Chernekoff** opinion; the briefs were in, oral argument had been heard and the handwriting was on the wall.

A trial court (the later of the only two other decisions on this point that have been reported) has reached the same conclusion as did this Court in *Chernekoff*:

"At no time does it appear that he was apprised of his right to consult with a Selective Service advisor as provided for in the regulations, nor did he see any notice posted in the premises occupied by the board informing him of such right, nor was any such notice called to his attention. None of this testimony was controverted by the Government."

United States vs. Giessel, 129 F. Supp. 223, 225.

But see the earlier one: *Dorn vs. United States*, 121 F. Supp. 171. Dorn had failed to exhaust his administrative remedies, however.

This type of failure on the part of a local board is of such a serious nature that it alone is a denial of due process and no administrative appellate procedure or decision can cure the defect. This Court has so indicated in *Chernekoff*, *supra*, page 724, citing *Franks vs. United States*, 9 Cir., 1954, 216 F. 2d 266.

Deprivation of such an important procedural opportunity should be considered a jurisdictional matter

**Chernekoff vs. United States*, 9 Cir., 219 F.2 721, 722, 724.

much as deprivation of notice of classification with its concurrent notices of rights to a personal hearing and to an appeal. It is more than a mere clerical error. Since the scope of review in selective service prosecutions is so limited, procedural due process should be strictly adhered to. In fact, the rule is stated in *N.L.R.B. vs. Cherry Cotton Mills*, 5th Cir., 98 F. 2d 444, 446, as well as in many other cases, that where the scope of review is very narrow and restricted then there is special need for an insistence on strict compliance with the procedural safeguards.

The failure to provide the registrant an essential protection, a protection specifically required by the regulation then in effect, results in a jurisdictional failure.

St. Joseph Stockyards vs. U. S., 298 U. S. 38;
Yamatoga vs. Fisher, 189 U. S. 86;
U. S. vs. Laier, 52 F. Supp. 392;
U. S. vs. Peterson, 53 F. Supp. 760;
U. S. ex rel. Bayly vs. Record, 51 F. Supp. 507,
 515.

It is settled that due process within an administrative agency requires that those administering it strictly follow protective regulations.

It is evident from the cross-examination of appellant that the Government believes the mere existence of officials (particularly the full-time clerk) willing and able to help the registrant, is sufficient compliance with the regulation.

The *posting* on the bulletin board is the essential portion of the regulation. It is conceded by appellant that every local board has many officials more or less available for giving advice to registrants; a posting on the bulletin board of such fact, *with their names and addresses* perhaps would meet the requirement of the regulation. Partial compliance is no compliance. There is no evidence that the "availability" of the many selective service functionaries, for free advice with respect to the varied problems of a registrant was conveyed, actually or constructively, to appellant.

"Q. Did you notice on the desk there the names of the Government appeal agent and of the local board members?

"A. No, I never." [R 45]

Further, certain facts must not be overlooked. Regrettable as it may be the numerous cases before this Court generally show that the relationship between the religious objector and the clerk has become an adversary proceeding. She is overburdened with detail, ever aware of the obligation of her board to meet its quota and is often personally antipathetic to the objector's claim for exemption from military service. He either senses this or soon comes to believe it through his or his friend's experience. Consequently he doesn't consider the clerk or the board members "on his side." Also, he has heard [this appellant actually learned] that lawyers giving specialized service and individual attention cost money. True, he can borrow from his relatives when he faces a felony indictment. But bor-

row for advice? "See the Congregation Servant or write New York", he is told. Realizing all this the promulgators of the regulations provided for Advisors and stipulated that their availability-for-free should be brought to the attention of the registrant *by a posting* of the fact of their existence *plus* their names and addresses.

It must be recalled that under the selective service regulation it is forbidden to allow the defendant to have counsel before the board. [§1624.1(b)] He has no right of counsel and cannot insist on a lawyer being present. See *United States vs. Pitt*, 3rd Cir., 1944, 144 F. 2d 169; *Niznik vs. United States*, 6th Cir., 1949, 173 F. 2d 328. Since the registrant does not have a lawyer when he appears before the local board for his hearing, this of necessity means that he must have advice in the making of a record on which he is later to be tried for a felony. While posting is constructive notice, the failure to give it is no less a violation of procedural due process than is the failure to give actual notice when actual notice is required by the regulations. When actual notice is required, failure to give it has been found fatal. See *United States vs. Fry*, 2d Cir., 1953, 203 F. 2d 638; *United States vs. Stiles*, 3rd Cir., 1948, 169 F. 2d 455.

An unreported decision by Judge Peirson Hall in *United States vs. Kariakin*, No. 23223, S.D. California, January 12, 1954, further supports appellant:

"MR. TIETZ: Your Honor has heard me on all the material points that I wish to present.

THE COURT: Very well.

I am inclined to think that your point is good in connection with the matter of not being properly advised of his rights. You call it a matter of defective notice.

MR. TIETZ: Yes, sir.

THE COURT: I do not know that it could be so classified as a defective notice because I do not know that they are required by any regulation to give a notice which includes that.

MR. TIETZ: But they do. That is what I was trying to establish.

THE COURT: They do that as a matter of practice and it is not—in other words, I do not think the practice can result in the creation of a right to a person to commit a crime, but I do think that under the regulations and the Selective Service procedure that these men are entitled to have advisors and persons performing the function of advisors and they are entitled to be able to look to them for advice and to be told by them what their rights were. In this case he was entitled as a matter of right to receive the fair summary of the adverse testimony if he requested it, but he was never advised that he had the right to request it, either by the notice and the fact that they do now contain that notice, which I understand you stipulated to is evidence that the Selective Service System recognizes that they are entitled to have that advice and were entitled to have that advice.

For that reason I think that the defendant here was deprived of his right to that advice and that the regulations were not followed in that respect

and he should be and is acquitted, and his bond is exonerated.

MR. TIETZ: Thank you." [underscoring supplied]

It is submitted that the failure to post the names and addresses of Advisors to Registrants, as required by the regulations, requires a reversal of the judgment of conviction.

II.

THE DRAFT BOARD LOST JURISDICTION TO ORDER APPELLANT TO REPORT FOR INDUCTION BECAUSE HE WAS DENIED PROCEDURAL DUE PROCESS OF LAW IN THAT HE WAS ILLEGALLY DEPRIVED OF HIS RIGHT TO AN INVESTIGATION, HEARING, REPORT AND RECOMMENDATION, UPON HIS ADMINISTRATIVE APPEAL CONTRARY TO SECTION 6(J) OF THE ACT.

The record indisputably shows the following two facts:

1. In 1952 when appellant was given an administrative appeal he *was* given the "special appellate procedures" provided in §1626.25 of the Selective Service Regulations. The file shows that in the eight months between his reclassification by the local board and his reclassification by the appeal board, the FBI investigated his current status, a Hearing Officer of the Depart-

ment of Justice interviewed him at length and the Attorney General made a recommendation, based on the foregoing, to the appeal board. [Ex 53, 59, 60-63]

2. In 1953, when appellant was given another administrative appeal (from the December 10, 1953 notice that he was retained in the undesired I-0 classification) he *was not* given the "special appellate procedures" to aid in determining his current status but was promptly reclassified in the same Class I-0 by the appeal board on January 7, 1954 [Ex 12].

It is appellant's position that he should have been given the special appellate procedures on the 1953 appeal; that if he must also show he was prejudiced by the failure to do so he has done this.

The whole policy of the draft law is directed to classification according to status. The law recognizes that status changes: 32 C.F.R. 1625.1 "(a) No classification is permanent." Appellant had filed considerable new material and much had transpired in the year after the first appeal. Appellant was entitled to be judged on a full and up-to-date record. The law requires it.

The "law" on this point includes the Act, the Regulations, and the decisions of this Court.

It is appellant's position that

1. The Act, which has been the same at all times since 1948, supports his contention;

2. The regulation, which has undergone three changes, and which seemingly forbids appellant's contention, must give way to the Act.

This Court's decision in *Sterrett vs. United States*, 9 Cir., 216 F. 2d 659, supports his above contentions and should be followed.

- 1. The Act is concerned with this type of appeal and, as thoughtfully construed, supports appellant's contention.**

Section 6(j) of the Act reads in part:

“Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board,

subject to such regulations as the President may prescribe to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

Section 6(j) shows that Congress is concerned with the protection of the rights it has given the religious objector, giving him also (and him alone) certain special appellate provisions. However, it also *seems* to show (and this misled the Department of Justice) that the special appellate procedures are only for registrants whose claims are not sustained by the local board. It will be necessary to deal with this misconception in this brief.

No reason is disclosed by the file why this appellant was not given the special appellate procedures. In other instances of such deprivation [see *Sterrett vs.*

United States, supra, and *De Moss vs. United States*, 75 S. Ct. 659; also see *Bates vs. United States*, 75 S. Ct. 529 where the Supreme Court went a step further] it was argued by the Government that the special procedures were to be given only where the local board had *not* given the registrant the 1-0 classification. Doubtless, similar reasoning applied here. However, the reason is unimportant; the deprivation is a fact and, as appellant argues, constitutes a denial of the due process granted by the Act.

When appellant was deprived of the special appellate procedures the Selective Service System lost jurisdiction over him. There is a great difference between the scope of review for the purpose of upsetting a determination by a draft board and the scope of review of the determination of some other administrative agencies. The scope of review permitted in draft cases is limited to that allowed in deportation cases. (See the cases cited in footnote 14 of the *Estep* case, 327 U. S. 114, 123, 66 S. Ct. 423 (1946).) Notwithstanding this limitation placed on the judicial review of an administrative determination, the fact remains that procedural due process of law must be strictly adhered to. The rule is stated in *N.L.R.B. vs. Cherry Cotton Mills*, 5th Cir., 1938, 98 F. 2d 444, 446, that where the scope of review is very narrow and restricted, then the need is greater for an insistence on strict compliance with the procedural provisions. This is true even in draft cases. (See *Ver Mehren vs. Sirmyer*, 8th Cir., 1929, 36 F. 2d 876, 881, and *United States vs. Zieber*, 3rd Cir., 1947, 161 F. 2d 90, 92.) These cases hold that

there must be a full and strict compliance with the procedural provisions. There are many other cases involving procedural violations that support this rule.

In the *Sterrett* and *De Moss* cases, *supra*, the registrants were deprived of their local-board-given I-O classifications by the appeal boards; appellant Uffelman was not but this is not a distinguishable difference. First, no one could foretell that Uffelman would not be given a less desirable classification by the appeal board. Second, his claim *involved* conscientious objection, the same as and as much as Sterrett's and De Moss': None belonged to any of the 124 pacifist-producing sects; each was one of Jehovah's witnesses; each was a conscientious objector to participation in war *for the identical reason*: his irrevocable commitment to his ministry. [Ex 84-85] No other reason was involved. His conscientious objection was inseparable from his ministry claim and was solely based on it; much of the evidence of his ministry activity supported his conscientious objector claim; *all* the evidence on his conscientious objections supported his ministry claim. Therefore, it is unquestionable that his appeal had a conscientious objector claim in it.

Finally, it must not be overlooked that the effect of every appeal is "to place the question of his proper classification in its entirety before the appeal board, and that the regulations required the board to review the case and the registrant's whole record *de novo*." *Cox vs. Wedemeyer*, 9th Cir., 192 F. 2d 920, 922, quoted approvingly in *Sterrett, supra*, 663. Thus, Uffelman's

claim was before the appeal board with two possibilities other than the I-O continuation that actually resulted: 1) He could have been "demoted" to a so-called higher classification [as were *Sterrett* and *De Moss*]; such demotion has not been infrequent. See this Court's reversals, upon confession of error, in the cases of *Kite vs. United States*, No. 14827; *Warren vs. United States*, No. 14828, *Padgett vs. United States*, No. 14829, *Brown vs. United States*, No. 14830; and 2) He could have been given his desired IV-D classification either because of the evidence already in the file or because of it plus the new evidence and opinions procured by the special appellate procedures. However, the facts normally revealed by an up-to-date FBI investigation and Hearing Officer Hearing, plus the educated opinions of the Hearing Officer and the Attorney General were never developed and the appeal board and this appellant both were deprived of their benefit.

Appellant was injured. As noted above, *all* classifications were opened by the appeal. This Court, in *Cox, supra*, observed that although Cox was appealing for a IV-D, minister's classification, the question of whether he was a conscientious objector was before the appeal board. It goes without saying that when Uffelman appealed in 1953 for the IV-D classification, this claim also was before the appeal board. He had considerable evidence in his file on this claim but obviously not enough to convince the fact triers. Since his claim of conscientious objection was specifically founded on his ministry, facts concerning his ministry that had a bear-

ing on his conscientious objections were pertinent and relevant to the inquiry. Ordinarily, and with respect to the 124 other types of conscientious objectors, the inquiry concerning their conscientious objections is an end in itself. The fact that here the evidence also applied to a "lower" classification specifically claimed does not render the evidence less relevant to the inquiry.

Part of appellant's argument on congressional intent, especially as this intent has already been interpreted by this Court, will be found in the succeeding paragraphs.

- 2. By the time of appellant's second processing by the appeal board the pertinent regulation had been amended and the change excluded him from the special appellate provisions; this amended regulation is contrary to the intent of Congress.**

The regulation putting into effect the portion of Section 6(j) of the Act with which we are concerned has always been §1626.25 of 32 C.F.R. It was amended twice since 1948, the Selective Service System reprintings of the regulation being dated 3 July 1952 and 5 January 1953. The 1952 amendment provided expressly that the special appellate provisions should be given only where "the local board has classified the registrant in any class other than I-O." The 1953 amendment by-passed the appeal board's consideration of the same file used by the local board and provided that the file should first be augmented by the

special appellate provisions; the augmented file was then used by the appeal board.

We are therefore concerned with whether this exclusionary amendment is valid; or whether it was required of the Selective Service System and the Department of Justice that this appellant be given the special appellate provisions in December 1953 when he perfected his appeal but was "short-circuited."

Congress knew that the local boards would not have the final say in all cases. It knew that appeals would be taken. In fact the act provides for appeals generally.

Section 10(b) of the act provides for the boards. Section 10(b) (3) in particular mentions the local boards and appeal boards. Section 6(j) deals specifically with conscientious objectors, including procedure on appeal. The sentence in that section of the act, reading "Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board" is mere surplusage. It is submitted that this is the holding of *Sterrett, supra*. "In view of what we here hold not only was the Department of Justice in error in refusing to hold a hearing but so much of the Regulation as would purport to deny such a hearing to these registrants was itself unauthorized by the statute." [665] The registrant would have the right to take an appeal in any event under the act. It merely recognizes that he has the right to take an appeal like

all other registrants. The conscientious objector is not limited in taking an appeal claiming other grounds. This provision of the act was merely to ensure that the conscientious objector had the right to appeal from the denial of the claim.

The controlling sentence is one following the one above quoted, namely, "Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing." The words "such appeal" cannot be reasonably interpreted to mean only in event he appeals from a denial of the conscientious objector claim. The Government so argued in the *Sterrett* case and its argument was rejected. The sentence says that upon the filing of the appeal the appeal board shall refer any such claim to the Department of Justice. If Congress intended to limit "such claim" it would have said so. The proper interpretation of this sentence is that whenever *any* appeal taken to the appeal board *involves* the conscientious objector claim, "such claim" must be referred to the Department of Justice for inquiry and hearing.

Congress also knew that there would be a *de novo* consideration of the case by the appeal board. Especially is this true of the Congress that passed the 1948 act since the regulations provide for the *de novo* consideration of the case upon appeal by the appeal board. An appeal board therefore performs the same function as the local board. It is required to consider the case as though the registrant had theretofore never been classified. Section 1626.26 provides that "The appeal

board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant."

Since Congress knew that the conscientious objector status should be considered *de novo* by the appeal board, this would mean that the conscientious objector I-O classification would no longer be in effect: It certainly would not be a binding judgment like a judgment of a court of law. The taking of the appeal from any local board classification for all practical purposes constituted an obliteration of that classification regardless of what the classification may have been. This would put the registrant in the same position before the appeal board as before the local board before any classification. Now with the registrant standing in this unclothed position before the appeal board and with the appeal board having doubt or intending to deny the conscientious objector classification, it would be plain that Congress intended that there would be an investigation and hearing in the Department of Justice.

The only way that this conclusion can be escaped is to have something specific in the act which would command that there be no investigation in such circumstance.

It is necessary to consider the reasonableness of this interpretation and the unreasonableness of the construction placed upon the act by the government. It would put Congress in an incongruous position. It would mean that the appeal board would have greater author-

ity than the local board, thus making the law inconsistent. The appeal board has no greater authority than the local board so far as classification is concerned. Congress was after the facts on claims. The only way the facts could be obtained was to refer the matter to the Department of Justice. The very purpose of the Department of Justice investigation was solely to protect the government against malingerers and to ensure the bona fide conscientious objector against arbitrary and capricious denials. If the local boards were not permitted by Congress to exercise arbitrary and capricious power, then certainly the boards of appeal were not intended by Congress to have such power. If the denial of the conscientious objector claim by the local board demanded a Department of Justice inquiry and hearing, then certainly the possibility of the same denial by the appeal board commanded a similar inquiry and hearing.

It should be remembered that the investigation and hearing in the Department of Justice is not only for the benefit of the government. It also is for the benefit of the registrant. The appeal board is entitled to know all the facts. A registrant is entitled to have the claim developed in the Department of Justice if it is not to be granted by the draft boards—either local or appeal.

It is unreasonable to say that Congress intended to make the safety and welfare of the conscientious objector before the appeal board dependent upon whether the claim was granted. The registrant would be much better off if the local board denied the claim in each

case. Then this would mean that he was assured of an investigation. Since the appeal board has no greater authority than the local board, the logical consequence is that the hearing in the Department of Justice must be had.

This seems to be the only reasonable interpretation that can be placed on the act. The act must be interpreted in a fair and just way. Congress intended that there should be a fair and just selection of registrants. It would not be fair and just to give a man denied the conscientious objector classification by the local board greater rights than one given the conscientious objector status by the local board. Congress did not intend to discriminate between two classes of registrants when they appear before the appeal board. Congress certainly intended to give the conscientious objector found by the local board to be entitled to the classification at least the same rights before the appeal board as the one denied such status by the local board.

Finally, the sentence of the act immediately preceding the sentence providing for the inquiry and hearing is merely declaratory of the rights of the registrant to an appeal. It merely iterates for the conscientious objector the right of appeal that is granted all registrants under the act. If the sentence is interpreted in this way, the sentence that follows about inquiry and hearing means that there should be an investigation and hearing following the filing of such appeal. "Such appeal" means an appeal by a conscientious objector or by a person having "such claim" as a

conscientious objector. The word "appeal" used in the sentence is not in any way qualified by reference to the type of classification that was made by the local board. Since the right to the investigation flows from the taking of the appeal, rather than the type of classification made by the local board, it is absolutely mandatory that the inquiry and hearing be conducted by the Department of Justice in every case where there is an appeal to the appeal board and where a claim for classification as a conscientious objector is involved in such appeal, regardless of the appeal board classification.

The usual conscientious objector registrant wants the I-O or I-A-O classification; the Jehovah witness conscientious objector wants the IV-D classification. The latter registrant must, of course, show additional facts, namely, that his vocation is the ministry, whereas the former need only satisfy the Selective Service System concerning his religious training and belief.

Yet, both types of conscientious objectors are just that. A few years ago the pacifist type objector who desired the I-O classification had a great problem in trying to convince the Selective Service System that he shouldn't be satisfied with the I-A-O classification; the same attitude of mind confronts the Jehovah's witness objector today. The same unwillingness among draft officials to try to comprehend his position is besetting him. This, doubtless, is the root of the interpretation of the law that has deprived the appellant of the special appellate procedures. Once it is recog-

nized why he is a conscientious objector, his right to these procedures would be recognized.

The application of these procedures to him would result in a compliance with the intent of Congress and be beneficial to all concerned for the application of all available facts to the solution of a problem is always beneficial. Since they were not given to him the judgment should be reversed.

III.

THE APPEARANCE BEFORE LOCAL BOARD WAS UNFAIR

On December 8, 1953 appellant had a personal appearance before local board. [Ex 13] At this hearing he had his last opportunity to favorably influence the local board with respect to his claim for a minister's classification. It is undisputed that he brought two ministerial coworkers to witness for him. The record, pages 32-33, 48, shows that they were mature men, friends and coworkers for many years, long experienced in the work of his sect and responsible officials in it. It is also undisputed that they weren't allowed in.

It is appellant's position that there is no adequate substitute for oral presentation and argument when they are matters of right. It is unquestionable that the regulation gives the registrant, appearing before his local board the right to discuss, point out, etc., etc. §1624.2(b) so provides. To deprive him of such a right is acknowledged to be a denial of due process. See

Davis vs. United States, 6th Cir., 199 F. 2 689. Appellant believes this principle extends to the use of oral testimony and to the aid such witnesses may give him in discussion and that it is an abuse of discretion for a local board to forbid him the use of witnesses under circumstances such as those of December 8, 1953. At least two courts have so held.

In *United States vs. Glessing*, D. of Minn. No. 8173, Judge Joyce, in acquitting the defendant said:

“Why this Board didn’t hear these three witnesses that the young man brought in I don’t know. I don’t know whether their story would have been an elaboration of what he had already told the Board or if it was supporting testimony which might have gone into greater detail than he had presented which might have disclosed facts which if the Board knew them might have caused them to change his classification. It doesn’t seem to me that it is quite the American way to slap down a man and say we won’t hear you at all about this thing. He was there; he was earnest; he was trying to get their story to the Board. What the story was I don’t know. He doesn’t know now because he wasn’t permitted to use them and the Board doesn’t know or didn’t know because the Board wouldn’t proceed to hear them.”

In *United States vs. Kobil*, E. D. of Mich., No. 32390 Judge Picard, in acquitting the defendant said:

“But that is sort of a temporary classification. He has got ten days in which to say, ‘Well, I want

to be heard.' He said he wanted to be heard. He came down there with two witnesses. They wouldn't let his witnesses in.

"That was wrong, unless it appeared that his witnesses were creating some kind of a disturbance or were there for the purpose of preaching Jehovah Witness doctrines. But they might have been there to show that he was on the corner and sold tracts, or that he went from door to door, and they might have been there for the purpose of showing that he was a conscientious objector and yet the board never heard them. That is wrong; absolutely wrong and unAmerican. The boards might as well find it out now as at any time.

"Now, the fact that this man won't salute the flag makes my blood boil; and that he won't fight for his country also makes my blood boil. But that hasn't anything to do with this, with you and me. I am the Judge; I have got to follow the law as it is in making a decision—not my natural tendencies, because he probably would have been in jail long ago if I had been permitted to follow my natural tendencies. That isn't it.

"I want to look at this from the angle that I believe I should as a Judge."

There are many features of the Jehovah's witnesses' work and terminology that are not well understood by outsiders. The explanations submitted by registrants are often rejected solely because of their youth. The same explanation, discussion, argument, "pointing out", etc., from an official of the sect, a man of the same generation as the board members, obviously has a

better opportunity to secure a respectful hearing and to be persuasive.

Appellant was arbitrarily deprived of this opportunity at the Appearance Before Local Board.

CONCLUSION

Appellant has been denied due process of law and the judgment of conviction should be reversed.

Respectfully submitted,

J. B. TIETZ,

Attorney for Appellant.

No. 14,780

IN THE

United States Court of Appeals
For the Ninth Circuit

WESLEY LAWRENCE UFFELMAN,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF FOR APPELLEE.

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No. 14,780

IN THE
United States Court of Appeals
For the Ninth Circuit

WESLEY LAWRENCE UFFELMAN,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 3231 of Title 18 United States Code, and Rule 27(a)(1) and (2) of the Federal Rules of Criminal Procedure. This case arises from a violation of Section 462 of Title 50 App. United States Code.

STATEMENT OF THE CASE.

Appellant first registered with Selective Service on September 18, 1948 (File 3¹). His occupation was that of a dairy and beef farmer (File 8). He was classi-

¹"File" refers to appellant's Selective Service file which was United States Exhibit No. 1 in the Court below.

fied by his Local Board in Class I-A on December 11, 1951 (File 52). His case was referred to the Department of Justice for inquiry and hearing with respect to the character and good faith of his conscientious objections pursuant to Section 6(j) of the Universal Military Training and Service Act (File 61). On July 8, 1952 T. Oscar Smith, Special Assistant to the Attorney General, recommended that his claim of conscientious objection be sustained (File 59). The Appeal Board classified appellant in Class I-O (File 64). Appellant appealed his classification of I-O to the Presidential Appeal Board on March 17, 1953 (File 96). On June 3, 1953 appellant was reclassified I-A (File 98). On June 25, 1953 appellant was ordered to report for induction (File 101). On July 8, 1953 he refused to submit to induction (File 105). On July 29, 1953 he was indicted, and on October 23, 1953 acquitted of violating the Universal Military Training and Service Act (File VII and 14). On November 13, 1953 appellant was reclassified in Class I-O (File 15). Appellant appealed this classification on November 22, 1953 (File 19). At that time he worked as a hod-carrier at wages of \$2.65 per hour (File 26). On November 22, 1953 appellant asked for a personal appearance (File 21). He submitted various letters and material to support his position that he was a minister of religion (File 24-54). Among this material was a letter signed by Homer L. Hendrickson, the Presiding Minister of the South Unit of the Sacramento Jehovah's Witnesses, Alex Uffelman, Assistant Presiding Minister, and Paul R. Hal-

bert, Bible Study Servant (File 31). Also, Mr. Albert O. Breece wrote a letter to the Board in which he stated that Uffelman was connected with "the Bible and ministerial work of Jehovah's Witnesses." (File 52). At the trial a statement was made that Mr. Hendrickson and Mr. Breece had accompanied appellant to his hearing (Tr. 48) but were not allowed to come before the Board. (Tr. 34, 48). At this time appellant was an Advertising Servant of the Sacramento South Unit of Jehovah's Witnesses, that is to say, the unit whose presiding minister was Mr. Hendrickson (File 24). At the trial Uffelman testified that as an Advertising Servant he was "just in charge of the magazines" and had no control over their distribution (Tr. 50). The Local Board continued appellant in Class I-O on December 10, 1953 (File 63). On January 7, 1954 appellant was classified I-O by the Appeal Board (File 72). After having a personal appearance on March 9, 1954 where he stated that his work was that of a hod-carrier (File 92), appellant was ordered to report on April 27, 1954 for institutional work at the Los Angeles County Department of Charities (File 108). It was stipulated at the trial although ordered to report, the defendant did not report as ordered (Tr. 20). Appellant was indicted for failing to comply with the order of his Local Board on January 19, 1955 (Tr. 4). Trial by jury was waived (Tr. 6). Appellant was tried by the Court, the Honorable Oliver J. Carter presiding, on March 11, 1955 (Tr. 17). There, the Clerk of the Local Board was asked whether any advisors were appointed dur-

ing the period of appellant's registration (Tr. 21). She answered, "Well, the Board members always act as advisors. The coordinator acts as an advisor. And there is an appeal agent that acts as an advisor * * *" (Tr. 21). Colonel Ferrill, an official of the Selective Service System, testified that a government appeal agent is required to be an attorney (Tr. 29). The Clerk of the Local Board testified that the names, addresses and phone numbers of the government appeal agent and the Board members were posted on her desk (Tr. 23). Appellant testified that during the period of his classification he had received advice from the legal counsel for Jehovah's Witnesses, Mr. Hayden C. Covington (Tr. 46, 47). After a motion for acquittal was denied appellant was found guilty as charged and sentenced to a term of a year and a day (Tr. 13). Notice of appeal was timely filed from the judgment of conviction.

STATUTES AND REGULATIONS.

Section 6(j), Universal Military Training and Service Act:

Conscientious objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not

include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the

appeal board that (1) he shall be assigned to non-combatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

Regulation 1604.41

Advisors to Registrants. Appointment and Duties.

Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service

to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants with the local board area shall be conspicuously posted in the local board office.

Regulation 1624.1 Opportunity to Appear in Person.

(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended.

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided*, That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further*, That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

Regulation 1626.25 (effective at time of appellant's classification) Special Provisions When Appeal Involves Claim that Registrant Is a Conscientious Objector.

(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in combatant training and service in the armed forces, but not conscientiously opposed to participation in noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-A-O, the appeal board shall proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

(2) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, and the local board has classified the registrant in Class I-O, the appeal board shall

proceed with the classification of the registrant. If, in such a case, the local board has classified the registrant in any class other than Class I-O, the appeal board shall transmit the entire file to the United States Attorney for the Federal judicial district in which the appeal board has jurisdiction for the purpose of securing an advisory recommendation from the Department of Justice.

QUESTIONS PRESENTED.

1. Does the failure to appoint a specified person "Advisor to Registrant" deny due process of law where the Clerk of the Local Board, Board members and a government appeal agent, who is an attorney, were available to give advice and the registrant in fact received advice from the legal counsel of Jehovah's Witnesses?

2. Is a registrant deprived of procedural due process of law when, although he has received one hearing before the Department of Justice concerning the good faith of his conscientious objections, he does not receive a second inquiry and hearing but is in fact classified as a conscientious objector?

3. Is Regulation 1624.1, Universal Military Training and Service Act, allowing persons to appear in behalf of the registrant only in discretion of the Local Board, invalid?

ARGUMENT.**I. APPELLANT WAS NOT DEPRIVED OF ADVICE SO AS TO DENY HIM DUE PROCESS OF LAW.**

Appellant's main argument in the instant case is based upon dicta in *Chernekov v. United States* (C.A. 9, 1955), 219 F.2d 721. In the course of an opinion reversing a case for many errors the Court observed, "The failure of the local board to comply with the posting of names and advisors as provided by 32 Code Fed. Regs. Section 1604.41 presents another problem of due process." Appellant's argument that no advisors were available to him apparently rests upon the testimony of Colonel Ferrill that no "advisor" was appointed as specifically provided in Section 1604.41. It is undisputed, however, that persons were available to act as advisors to registrants and that the names of these advisors were posted in the local board office. The Clerk of the Local Board testified that Board members, the Selective Service Coordinator and the government appeal agent acted as advisors (Tr. 21). She also testified that the names of these persons were posted on her desk (Tr. 23). Colonel Ferrill testified that the government appeal agent was required to be an attorney (Tr. 29). He further testified that the persons termed "advisors" under the 1940 Act were utilized for the purpose of assisting registrants in making out their questionnaires and were laymen (Tr. 30), Colonel Ferrill also observed that Selective Service has fewer full time employees now than under the 1940 Act and that clerks were required to "double up" on their duties (Tr. 31).

Appellant is claiming a deprivation of due process of law. Such a deprivation requires more than the lack of a title. Assuming that no persons were appointed to appellant's Local Board who had the title "Advisor to Registrants", it is clear that all the advice appellant desired was immediately available to him. Under the 1940 Act a distinct position was created for the purpose of assisting in the completion of questionnaires. Under the present Act those duties are carried out by the regular employees of the draft board. Section 1604.41 was never interpreted by the administrative agency involved as mandatory but always was assumed to be permissive by the agency itself (Tr. 31). The job done by the layman "advisor" of 1940 is presently being accomplished by attorney government appeal agents and others who are familiar with Selective Service procedure. The fact that the government appeal agent does not wear a title "Advisor to Registrants" makes his advice no less valuable.

Section 1604.41 was complied with in appellant's case. Persons were available for advice and their names were posted. More than that is not required. It should be noted that on an individual's draft card itself there is a notation that for advice a registrant should see his government appeal agent (SSS Form 2). This Court has indicated its agreement with the principle expressed in *Martin v. United States* (C.A. 4, 1951), 190 F.2d 775, namely, that "procedural irregularities or omissions which do not result in prejudice to the registrant are to be disregarded."

Knox v. United States (C.A. 9, 1952), 200 F.2d 398. In order to take advantage of any procedural irregularity a defendant in a Selective Service case must make some showing of prejudice from the procedure adopted. *United States ex rel. McCarthy v. Cook*, (C.A. 3, 1955), 225 F.2d 71; *United States v. De Lime* (C.A. 3, 1955), 223 F.2d 96; *Eagles v. Samuels*, 329 U.S. 304.

What showing has appellant made here? Examination of the voluminous file in the case discloses no procedural right of which appellant did not take advantage. Every hearing allowed by law was requested by appellant. Every opportunity to present material to support his position was seized. It is apparent by an examination of the file and of appellant's testimony in the Court below that he was intimately familiar with all his rights under the Selective Service Act. Appellant made no showing that he was prejudiced from a lack, if any, of an advisor.

His testimony was directly to the contrary. As a matter of fact, appellant did have advice. He had advice from probably the outstanding authority on Selective Service law today. A superficial examination of the Supreme Court cases involving Selective Service will disclose his name. It might be added that the records of this Court show his appearance as counsel for appellants in innumerable cases arising under the Selective Service Act. Appellant's advisor was the legal counsel for Jehovah's Witnesses, Mr. Hayden C. Covington of New York City (Tr. 46, 47). Appellant, according to his own testimony, consulted

with Mr. Covington during the whole period of his classification and, more particularly, on the last classification which resulted in the order that appellant violated (Tr. 47).

II. APPELLANT WAS NOT DEPRIVED OF PROCEDURAL DUE PROCESS OF LAW BY THE LACK OF A SECOND DEPARTMENT OF JUSTICE HEARING.

Appellant received a hearing by the Department of Justice with respect to the character and good faith of his conscientious objections as required by Section 6(j) of the Universal Military Training and Service Act (File 61). The Special Assistant to the Attorney General recommended that his claim of conscientious objection be sustained (File 59). In 1953, however, after the Appeal Board had classified appellant in Class I-O, on his appeal to the Presidential Appeal Board he was classified I-A (File 96). After his 1953 acquittal of failure to submit to induction he was reclassified in Class I-O (File 15). On this occasion appellant's file was not referred to the Department of Justice for a hearing because (as stated by appellant) Regulation 1626.25 provided that the file should be referred to the Department of Justice only where the "local board has classified the registrant in any class other than I-O" (App. Br. 21, 32 C.F.R., Section 1626.25). It was the position of Selective Service that this amended regulation was declaratory of existing law. This Court, however, in the case of *Sterrett v. United States* (C.A. 9, 1954), 216 F.2d 659, held that the regulation was contrary to the intentment of the

statute because since the Appeal Board had power to classify registrants in any class, a I-O classification might be considered without the benefit of a Department of Justice recommendation to the detriment of the registrant. *Sterrett v. United States*, supra, at 663. This Court observed:

“The registrant whose evidence presented to the local board and whose personal appearance are such as to impress that board that he is entitled to a I-O classification, finds himself at a distinct disadvantage; he is denied a hearing before a hearing officer when he appeals for a ministerial classification and the board, after denying that, comes to consider Class I-O, the next lowest class claimed by him, as it is required to do under Regulation §1626.26, supra. Had he made a less favorable showing before the local board and been classified I-A to begin with and then appealed seeking exemption on both ministerial and conscientious objector grounds he would have had the hearing.

“There is no doubt but that the legislative history of §6(j) indicates that it was the understanding and intention of Congress to provide a reference of all conscientious objector claims not initially granted by the appeal board to the Department of Justice * * *” *Sterrett v. United States*, supra, at 663, 664.

Section 6(j) of the Act concerns only conscientious objectors. It provides that

“The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the

person concerned, * * * The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board, * * * to perform * * * such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *"

It is to be noted that the Department of Justice recommendations are limited to the question of the good faith and character of the registrant's conscientious objections. Section 6(g) governs the deferment of ministers of religion, and there is no requirement nor provision for a recommendation by the Department of Justice in cases arising under this exemption.

The *Sterrett* case held merely that the appellant's classification there was improper because he had been deprived of any benefit the Department of Justice report might have had with respect to a consideration of his conscientious objector claim. Here, appellant received a conscientious objector classification. Appellant could have received no benefit from a Department of Justice recommendation, nor suffer any detriment from its lack, because he, in fact, received all that the Department of Justice was empowered to recommend that he receive.

It appears, further, that appellant had actually received a Department of Justice hearing. The De-

partment of Justice's recommendation was for a I-O classification. The Department of Justice had given appellant all that it was empowered to give him. All that a further hearing could have done would be to create the possibility of an *unfavorable* recommendation. Appellant is merely asking to replay a game which he has already won.

It is to be observed that the *Sterrett* case did not hold that a Department of Justice hearing was constitutionally required. The granting of exemptions and the procedure therefor is entirely in the discretion of Congress.

Richter v. United States (C.A. 9, 1950), 181 F.2d 591;

George v. United States (C.A. 9, 1952), 196 F.2d 445.

The *Sterrett* case only held that Section 6(j) of the Universal Military Training and Service Act requires a Department of Justice hearing in conscientious objector cases. It did not hold that a Department of Justice hearing must be held in all Selective Service cases. Where, as here, appellant has received a conscientious objector classification, he has no valid complaint concerning the lack of such a hearing. Such a hearing could not conceivably have benefited him nor its lack have prejudiced him. Without prejudice there can be no deprivation of procedural due process of law.

Martin v. United States (C.A. 4, 1951), 190 F.2d 775;

Knox v. United States (C.A. 9, 1952), 200 F.2d 398;

United States ex rel. McCarthy v. Cook (C.A. 3, 1955), 225 F.2d 71;

United States v. De Lime (C.A. 3, 1955), 223 F.2d 96;

Eagles v. Samuels, 329 U.S. 304.

III. SECTION 1624.1 OF THE REGULATIONS IS NOT INVALID.

Section 1624.1(b) of the Selective Service regulations provides that

“No person other than a registrant shall have the right to appear in person before the local board,
* * *”

The local board, to be sure, has the right to allow persons to appear on behalf of the registrant. Appellant has neither mentioned this regulation nor shown any basis for its invalidity. There is certainly no constitutional infirmity since proceedings before a Selective Service Board are not a trial. *United States v. Nugent*, 346 U.S. 1. The Selective Service statute contained no provisions inconsistent with Regulation 1624.1(b). In the absence of some showing by appellant, the general rule that regulations should be upheld unless clearly contrary to law should be followed.

Appellant made no real showing that he was denied permission to present witnesses to the Board. The record at pages 33 and 34 of the transcript is somewhat ambiguous. Appellant does not state that he informed the Board that he had witnesses or that it refused his request for their testimony. On cross-

examination all appellant states is that he told the Local Board "that I had Mr. Hendrickson and Mr. Breece waiting and that I would like to have them come in * * * And that they could verify the things that I had to say were true." (Tr. 48).

Assuming, however, that permission to call witnesses was in fact denied, appellant has made no showing that this lack was prejudicial to him. It is the Appeal Board which actually gives the final classification in these cases.

Cramer v. France (C.A. 9, 1945), 148 F.2d 801;

Tyrrell v. United States (C.A. 9, 1952), 200 F.2d 8;

Reed v. United States (C.A. 9, 1953), 205 F.2d 216.

As is said in *Tyrrell v. United States*, supra,

"Such action completely and finally supersedes the action of the local board in classifying * * *, although the classification of the Appeal Board is the same as that of the local board." (at page 11.)

In the *Tyrrell* case the summary prepared by the local draft board was incomplete. However, the registrant's whole file was sent to the Appeal Board, and it contained the information claimed to be lacking in the local board's summary of proceedings. In *Knox v. United States* (C.A. 9, 1952), 200 F.2d 398, this Court reversed a conviction because no personal appearance was given the registrant at all. That is not the situation here. The instant case falls within the rule of the *Tyrrell* case. Here any information which

the registrant claimed Mr. Hendrickson and Mr. Breece could supply had already been supplied. Both Hendrickson and Breece filed statements with the Board (File 31, 52). Mr. Hendrickson's letter was received on December 3, 1953 and Mr. Breece's letter on December 8, 1953. Appellant's hearing was held on December 8, 1953. The Appeal Board, therefore, had all the factual information which these two persons could have supplied. Appellant's argument with respect to the effectiveness of oral explanation has already been ruled upon by this Court in the case of *Jerry Lee Reese v. United States*, No. 14,596, decided August 22, 1955. The Court there held that oral presentation even by the registrant was not the *sine qua non* of a valid classification by Selective Service.

Appellant has not made any showing that Regulation 1624.1 is invalid nor has he shown that any prejudice resulted from the lack of Mr. Hendrickson's and Mr. Breece's testimony. If they could have testified as to matters other than contained in their letters to the Board, appellant could have proved that fact by calling them as witnesses. Appellant's characterization or speculation concerning the testimony they might have given is not sufficient to require this Court to hold that he was prejudiced by the lack of their testimony.

Nothing here has been shown which would justify any finding of abuse of discretion on the part of the Board. The Court below, after hearing appellant's testimony, found to the contrary. This Court, without

even the advantage of hearing the manner in which appellant testified or seeing him testify should not come to a contrary conclusion.

CONCLUSION.

Appellant has not shown any error in the proceedings below or in his administrative classification. He admittedly failed to obey an order of his local draft board. The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
November 2, 1955.

Respectfully submitted,

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United States
Court of Appeals
for the Ninth Circuit

GLENN WOODBURY and PEARL WOOD-
BURY, Appellants,

vs.

ALFRED CLERMONT and MARGUERITE I.
CLERMONT, Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Montana

FILED

NOV - 1 1955

PAUL P. O'BRIEN, CLERK

No. 14782

United States
Court of Appeals
for the Ninth Circuit

GLENN WOODBURY and PEARL WOOD-
BURY, Appellants,
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ALFRED CLERMONT and MARGUERITE I.
CLERMONT, Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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J. W. RIMEL,

First National Bank Building,

Missoula, Montana,

Attorneys for Appellees and Plaintiffs.

[1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court for the District
of Montana, Missoula Division

No. 382

ALFRED CLERMONT and MARGUERITE I.
CLERMONT, Plaintiffs,

vs.

GLENN WOODBURY AND PEARL WOOD-
BURY, Defendants.

COMPLAINT

Come now the plaintiffs and for their first cause
of action, allege:

I.

That the plaintiffs are citizens of the Dominion
of Canada. That the defendants are citizens of the
State of Montana. That the amount in controversy
herein exceeds the sum of Three Thousand Dollars
(\$3,000.00) exclusive of interest and costs.

II.

That on or about the 2nd day of May, 1953, the
plaintiffs and the defendants entered into a written
contract, a copy of which is attached hereto marked
Exhibit "A" and by this reference made a part
hereof. That the Jannsen farm referred to in Ex-
hibit "A", which is the subject of the contract be-
tween the parties, consists of the following described
tract of land, to-wit:

The North Half of the Northeast Quarter of the Southeast Quarter ($N\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}$) of Section Thirty-four (34); West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$) of Section 35, Township 10 North, Range 19 West, M.P.M. [2]

III.

That on the 2nd day of May, 1953, plaintiffs, as recited in Exhibit "A", paid to the defendants the sum of Five Thousand Dollars (\$5,000.00), which sum is the deposit and earnest money mentioned in said Exhibit "A". That the defendants still retain such amount. That the plaintiffs have made no other payments under said contract.

IV.

That on the 11th day of June, 1953, the defendants not having furnished an abstract of title for the real property described in the contract, Exhibit "A", the plaintiffs by letter requested of the defendants that such abstract be furnished. That thereafter and on June 18, 1953, the defendants furnished an abstract of title to the plaintiffs herein, who thereupon submitted the same to their attorneys for examination.

IV.

That the title to the real property as disclosed by said abstract was not merchantable in this: One Louis Boisot was at one time the owner of the real

property. Louis Boisot, so far as is disclosed by the abstract, never conveyed the land or his interest therein to the defendants herein or any of their predecessors in interest. The lands herein described were, subsequent to the ownership of Louis Boisot, sold for taxes, and later the title to the lands herein described was quieted by a court decree, but neither the tax title proceedings nor the quiet title proceedings named Louis Boisot as a party, and that the interest of Louis Boisot has never been divested of record.

V.

That the said abstract did not disclose that [3] the title to the said property was vested in the defendants but disclosed that the title to the property is vested in Bernhard Jannsen and Anna Jannsen. A copy of a contract furnished with the abstract but not as a part of it disclosed that the defendants' only rights in the property are their rights as buyers under a conditional sales contract.

VI.

That the said abstract did not disclose the property to be free of liens and encumbrances, except a mortgage to The Federal Land Bank and B. Jannsen, and on the contrary, disclosed, which is the fact, that the title to the said land is encumbered by the lien of a repayment contract between the Bitter Root Irrigation District and the United States in an undisclosed amount. Plaintiffs are informed and believe and therefore allege upon in-

formation and belief that the amount of such lien is approximately Forty Dollars (\$40.00) per acre on the irrigable acreage within the said irrigation district and that one hundred twenty-one (121) acres of the described lands are within the said irrigation district, making a total lien against the said lands in the sum of approximately Four Thousand Eight Hundred Forty Dollars (\$4,840.00).

VII.

That the plaintiffs caused the abstract of title so furnished to be examined by attorneys of their choice and that thereafter and on June 22, 1953, plaintiffs wrote to the defendants a letter which was duly mailed to the defendants on June 22, 1953, and received by the defendants on or about June 23, 1953. That said letter is attached hereto, marked Exhibit "B", and by this [4] reference made a part hereof.

VIII.

That the defendants did not respond to plaintiffs' letter of June 22, 1953, and thereafter and on July 27, 1953, plaintiffs wrote to the defendants a further letter, which letter was mailed to defendants on July 27, 1953, and received by them on or about July 28, 1953. A copy of said letter is attached hereto, marked Exhibit "C" and by this reference made a part hereof.

IX.

That on July 30, 1953, defendants replied to plaintiffs' letters of June 22, 1953, and July 27,

1953, by a letter, a copy of which is attached hereto marked Exhibit "D" and by this reference made a part hereof. That since said date of July 30, 1953, the plaintiffs have received no advice or information from the defendants relative to the contract, Exhibit "A", or to the title defects described herein and in Exhibit "B".

X.

That more than a reasonable time has elapsed since the title defects were pointed out to the defendants and that the defendants are obliged under their said contract to return the Five Thousand Dollars (\$5,000.00) to the plaintiffs herein. That although the plaintiffs have demanded the return of such \$5,000.00, the defendants have failed, neglected and refused to return it to plaintiffs' damage in the sum of \$5,000.00, together with interest thereon at the rate of six per cent (6%) per annum since the 3rd day of August, 1953.

XI.

That the defendants have at all times been in the full and peaceful possession of the lands described [5] in Exhibit "A" and have had and enjoyed all of the crops produced and harvested therefrom during the year 1953, and that the plaintiffs have never been in possession of said lands or any part thereof.

For a Second Cause of Action and in the Alternative, Plaintiffs Complain:

I.

Plaintiffs incorporate herein by reference all of the allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and XI of plaintiffs' first cause of action.

II.

Plaintiffs without in any wise admitting that they have failed to perform any of the obligations required to be performed by them under Exhibit "A", allege that they should be relieved of a forfeiture of the Five Thousand Dollars (\$5,000.00) earnest money paid to the plaintiffs, and as grounds for relief from the forfeiture allege: That they entered into Exhibit "A" in good faith, intending to purchase the property described therein. That as the time for the last payment to defendants approached and they had not received an abstract of title, they wrote to the defendants to secure the same; that upon being furnished such abstract plaintiffs thereupon delivered it to what they believed to be reputable attorneys for an opinion thereon. That on receiving their attorneys' opinion, plaintiffs transmitted the contents thereof to the defendants. That although more than three months have elapsed since such time, defendants have taken no position with respect to the asserted defects in the title and have neither denied the existence of the asserted defects nor indicated any [6] intention to cure them. That the plaintiffs who had intended to move from their residence in Canada to Ravalli County have been uncertain as to whether the contract could be per-

formed, whether they would be establishing a new home and business in Montana, or whether they would continue to reside in Canada and there make their living. That by reason of the complete lack of response from the defendants and being uncertain whether the contract, Exhibit "A", would be performed, plaintiffs finally decided to return to their homes in Canada and continue their business there. That if at this late date the defendants were to evidence some interest in the title to the said property and were able to demonstrate that they would be able to deliver title called for by the contract, Exhibit "A", the plaintiffs could only at great expense and inconvenience to themselves now perform because of the changes in conditions which have occurred since the date of Exhibit "A". That the plaintiffs, if they have defaulted in the performance of any obligations by them to be performed, have done so in good faith; that they have not been guilty of any grossly negligent, fraudulent or willful breach of duty and are entitled to be relieved of any forfeiture on their part pursuant to the laws of Montana in that case made and provided.

Wherefore, plaintiffs pray for judgment,

1. In the amount of Five Thousand Dollars (\$5,000.00), together with interest thereon at the rate of six per cent (6%) per annum from August 3, 1953, or in the alternative,

2. That the Court relieve the plaintiffs from [7] a forfeiture of the Five Thousand Dollars (\$5,-

000.00) earnest money paid on account of Exhibit "A" upon such terms and conditions as seem just to the Court sitting as a Court of Equity, and that judgment granting such relief be entered by the Court.

/s/ RUSSELL E. SMITH,
Attorney Preparing this Complaint

/s/ SMITH, BOONE & RIMEL,
Attorneys for Plaintiffs

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RECEIPT AND AGREEMENT TO SELL AND PURCHASE

OFFICIAL FORM OF THE MONTANA
ASSOCIATION OF REALTORS

Stevensville

May 2

1953

RECEIVED FROM ALFRED CLERMONT

sum of FIVE THOUSAND Dollars (\$ 5,000.00) as a deposit and earnest money in

payment of the purchase price of the following described real property situated in _____ County of _____
State of Montana, to-wit: Jansen Farm consisting of 140 acres now owned by Glen Woodbury

All irrigation fixtures and equipment, plumbing and heating fixtures and equipment, including stoker and oil tanks, water heaters and burners, electric light
fixtures (excluding bulbs), bathroom fixtures, roller shades, curtain rods and fixtures, venetian blinds, window and door screens, linoleum, all shrubs and trees, and all
other fixtures attached thereto, except none

to be left upon the premises as a part of the property purchased. The following personal property is also to be left upon the premises as a part of the property pur-
chased: none

It is hereby agreed that the total purchase price is the sum of THIRTY SIX THOUSAND Dollars (\$ 36,000.00)
payable as follows: The earnest money hereinabove received for in the sum of FIVE THOUSAND Dollars (\$ 5,000.00)
and the balance of the purchase price in the sum of THIRTY ONE THOUSAND Dollars (\$ 31,000.00)

to be paid as follows: (If on contract, state terms generally and if escrow, also name of escrow holder)
Payable in full to Mr. Woodbury less about \$20,000.00 mortgage to Bernhard
Janssen and the Federal Land Bank, Janssen mortgage about \$16,500.00 and
\$3,500.00 Federal Land Bank, Mortgage to Janssen payable \$1,000.00 a year
at 3% and Federal Land Bank \$140.00 twice a year. Balance to Woodbury
June 15, 1953.

1. It is further agreed Seller shall at his expense furnish Purchaser an Abstract of Title continued to a date subsequent hereto showing merchantable title to
above described property vested in Seller, or in lieu thereof, at Seller's option, a title insurance policy insuring title thereto vested in Purchaser, free and clear of all
debts and encumbrances, except Mortgage to B. Janssen \$16,200.00 and Federal Land Bank,
\$3563.98

2. It is further agreed that the broker assumes no responsibility in regard to the title and broker recommends that Purchaser have the Abstract of Title or Title In-
surance Policy examined by an attorney.
3. The said property is to be conveyed by contract for Deed and the personal property by Bill of Sale, free and
clear of all encumbrances except building and zoning ordinances and regulations, building and use restrictions, rights of way and easements, reservations in Federal
lands and State deeds and those enumerated in Section 1 above.

3. Seller shall pay all of the taxes and assessments for 12/12ths of 1953 and prior years and Purchaser shall pay all taxes and assessments thereafter.
4. Insurance and interest on mortgage or contract indebtedness shall be prorated as of May 4, 1953
debts and encumbrances to be discharged by Seller may at his option be paid out of the purchase money at the date of closing.

4. If Seller does not approve this sale within 10 days hereafter, or if Seller's title is not merchantable or insurable and cannot be made so within a
reasonable time after written notice containing statement of defects is delivered to Seller, then said earnest money herein recaptured for shall be returned to the Purchaser
and all rights of Purchaser terminated unless Purchaser waives said defects and elects to purchase, in which case the sale is approved by the Seller and Seller's
title is merchantable or insurable and Purchaser neglects or refuses to complete the purchase or shall fail to pay the balance of the purchase price as hereinabove
provided, then said earnest money shall be forfeited to the Seller as liquidated damages and not as a penalty and this Agreement thereupon shall be of no further force
and effect.

5. Possession shall be delivered Purchaser on or before the _____ day of _____, 19____.

6. Purchaser enters into this Agreement in full reliance upon his independent investigation and judgment and there are no verbal or other agreements which
modify or affect this Agreement.
7. Time is of the essence of this Agreement. Purchaser's rights herein are not assignable without the written consent of the Seller.

8. Special provisions: Purchaser is to get 1/2 of hay - 1/3 of grain - 1/3 of the
peas. Purchaser is to pay taxes (water) for 1953.

Agent, By

Agents for

Seller

I hereby agree to purchase the above described property and pay the price of Thirty Six Thousand Dollars
36,000.00 as set forth above and grant to said agent _____ days hereafter to secure Seller's acceptance hereof, during which period my said
agent shall not be subject to revocation. I/we hereby acknowledge receipt of a copy of this Receipt and Agreement to Sell and Purchase, bearing the Agent's and my/our
signatures.

Witness my hand and seal this _____ day of _____, 19____.

/s/ Alfred Clermont

/s/ Marguerite I. Clermont

Purchaser

For valuable consideration I/we agree to sell and convey to the above named agent a commission amounting to \$1,800.00 or \$1,800.00 (Five per cent of the above mentioned selling price for services rendered in
procuring the sale of the above described property) to be paid to the agent as above provided the said agent shall be paid to or released by the agent to the extent of the agreed upon
commission with interest to the seller. I/we authorize said agent to pay out of the cash proceeds of sale the expense of furnishing evidence of title, of recording fees and
related bearing my/our signature and that of the Purchaser named above.

Witness my hand and seal this _____ day of _____, 19____.

/s/ Glenn Woodbury

/s/ Pearl Woodbury

Seller

(If husband and wife both must sign.)

EXHIBIT "B"

Huson, Montana, June 22, 1953

Mr. Glenn Woodbury and Pearl Woodbury,
Three Mile District, Stevensville, Montana.

Dear Mr. and Mrs. Woodbury:

With regard to the Receipt and Agreement to Sell and Purchase, entered into on May 2, 1953, between you as Sellers and us as Purchasers, an abstract of title to the property described in the agreement, was delivered to our attorneys on June 18, 1953, together with a certified copy of a contract for the sale of the property by Bernhard Jannsen and wife to you bearing date April 24, 1952.

Please consider this letter as a written notice advising you of, and containing a statement of defects, in the title. The following constitutes a statement of defects:

1. In the first place title to this property is not vested in you but rather record title is in the names of Bernhard Jannsen and Anna Jannsen, husband and wife. In this connection the Receipt and Agreement to Sell and Purchase contemplates a sale from you to us subject to a mortgage in favor of B. Jannsen and subject to a mortgage in favor of the Federal Land Bank. It does not contemplate our taking an assignment of your contract with the Jannsens. We therefore demand that you obtain title to the property to the end that the provisions of the agreement can be complied with.

2. Our attorneys advise us that the property is subject to a lien in favor of the United States of

America arising out of a contract with Bitter Root Irrigation District dated September 16, 1948 recorded June 11, 1949 in Volume 13 of Misc. page 91; the premises are included within the Bitter Root Irrigation District and as such the lands are subject to said contract lien. Demand is therefore made upon you to remove this lien as the title is not merchantable with the lien existing.

3. Our attorneys also advise us that there is a break in the title arising under the following circumstances:

While this property was owned by Bitter Root Valley Irrigation Company a Trust Deed was Executed in favor of First Trust and Savings Bank, an Illinois corporation, and Emile K. Boisot, Trustee. Subsequently the Irrigation Company was adjudged a bankrupt and suit was filed by the grantees of the trust deed; thereafter the property was sold by a Special Master appointed by the Federal Court to Louis Boisot. The property was not specifically described in this Special Master Deed, but in our opinion comes within the provision "All other property real and personal of every kind and description whatsoever owned by the Bitter Root Valley Irrigation Company, or its Trustee in bankruptcy, or in which it or he has any interest." We are unable to find any deed to this property from Louis Boisot.

We demand that in some appropriate manner, Louis Boisot and wife, if married, be legally divested of their interest in this property.

The Receipt and Agreement to Sell and Purchase provides that you shall have a reasonable time within

which to make the title to this property merchantable and we are accordingly allowing you a reasonable time within which to do so. Would you kindly advise us as to what you believe to be a reasonable time and also your decision as to whether you will remedy the defects noted in this letter within a reasonable time so as to provide us with a merchantable title subject only to the exceptions noted in the agreement.

If you fail to correct these defects and fail to make your title merchantable within a reasonable time a written demand will be made upon you for the return of the earnest money, namely \$5,000.00 paid by us on the execution of the agreement.

We are returning herewith to you the certified copy of contract of sale and our attorneys advise us that they are returning by **registered mail** the abstract of title as you requested, to the Federal Land Bank, c/o Dan Geiman, Hamilton, Montana.

Yours very truly,

/s/ ALFRED CLERMONT

/s/ MARGUERITE I. CLERMONT

EXHIBIT "C"

Huson, Montana, July 27, 1953

Mr. Glenn Woodbury and Pearl Woodbury,
Three Mile District, Stevensville, Montana.

Dear Mr. and Mrs. Woodbury:

Under date of June 22, 1953 we advised you by letter of the defects which our attorneys found in the title to your property and demanded that the title be made merchantable. In that letter we requested that you advise us as to what you believe to be a reasonable time for the correction of those defects and also whether you in fact intend to remedy the defects.

More than a month has elapsed since our letter and we have had no response from you. Your failure to reply is certainly indicative that you do not intend to make this title merchantable.

Unless we are advised by you within one week after you receive this letter that you intend to take steps to correct the defects, and when you will have the title merchantable as provided in the agreement, we will proceed on the basis that the provision of the agreement that "the said earnest money herein receipted for shall be returned to the purchaser on demand" is applicable. In the event that you do not intend to make the title merchantable, then please consider this letter as our demand upon you to im-

mediately return to us the earnest money receipted for namely, \$5,000.00 and your failure so to do will require our filing an action against you.

Yours very truly,

/s/ ALFRED CLERMONT

/s/ MARGUERITE I. CLERMONT

EXHIBIT "D"

Three Mile District, Stevensville, Montana

July 30, 1953

Mr. Alfred Clermont and
Mrs. Marguerite I. Clermont
Huson, Montana.

Dear Mr. and Mrs. Clermont:

We received your two letters of June 22 and July 27 regarding our May 2, 1953 contract for the sale and purchase of the Bernhard Jannsen farm. We have turned the matter over to our attorneys and they are checking over the objections which you have made. We expect to hear from them very shortly and get their advice on the statement of defects in title. You may be assured that the matter is being promptly taken care of and that we will act on the advice of our attorneys in the matter of clearing up any defects in merchantability of title.

Very truly yours,

/s/ GLENN WOODBURY

/s/ PEARL WOODBURY

[Endorsed]: Filed October 7, 1953.

[Title of District Court and Cause.]

MOTION TO DISMISS

Defendants move the Court to dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

/s/ LEIF ERICKSON,

Attorneys for Defendants [14]

Affidavit of Service by Mail attached. [15]

[Endorsed]: Filed November 2, 1953.

[Title of District Court and Cause.]

ORDER

The defendants' motion to dismiss having come on for hearing before the Court on the 3rd day of February, 1954, and the matter having been fully argued and submitted to the Court, and the Court having considered all of the arguments, and the briefs submitted, and being fully advised in the premises,

It Is Therefore Ordered that the defendants' motion to dismiss be and the same hereby is denied, and the defendant is granted 20 days within which to further plead.

It Is Further Ordered that the Clerk of this court forthwith notify the attorneys of record for the respective parties of the making of this order.

Done and dated this 10th day of March, 1954.

/s/ W. D. MURRAY,
U. S. District Judge [16]

[Endorsed]: Filed March 10, 1954.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Answer to First Cause of Action

As and for their answer to the first cause of action of the complaint herein, defendants allege as follows:

First Defense

The first cause of action of the complaint fails to state a claim against defendants upon which relief can be granted;

Second Defense

Admit the allegations contained in paragraphs I, II, III and IV; deny the allegations of the paragraph numbered IV beginning at line 17 through line 31 of page 2 of said complaint;

Answering paragraph V, defendants admit that title to the property is vested in Bernhard Jannsen and Anna Jannsen;

Answering paragraph VI, admit that the irrigated portion of the lands is included in the Bitter

Root Irrigation District, and that in common with all of the lands so included in said District is subject to the lien provided in a certain Repayment Contract between the Bitter Root Irrigation District and the United States; deny the other allegations of paragraph VI;

Answering paragraph VII, admit the allegations of said paragraph;

Answering paragraph VIII, admit the receipt of the letter marked Exhibit "C" and deny the other allegations of the said [17] paragraph;

Answering paragraph IX, admit the receipt by the plaintiffs of the letter, Exhibit "D", deny the other allegations of said paragraph;

Answering paragraph X, admit the defendants have refused to pay to the plaintiffs the Five Thousand Dollars (\$5,000.00) referred to and deny the other allegations of said paragraph;

Answering paragraph XI admit the allegations of said paragraph;

Allege that the plaintiffs, when the contract Exhibit "A" was entered into made specific inquiry concerning the lien of the Bitter Root Irrigation District and the United States on the lands here involved and entered into the said contract with full knowledge of the existence of the said lien and waived any right to object to the marketability of the title by reason of the existence of the said lien;

Allege that when the plaintiffs entered into the contract, Exhibit "A", the plaintiffs knew that legal title to the property was vested in Bernhard Jannsen and Anna Jannsen, and that the said Bernhard

Jannsen and Anna Jannsen did not hold a mortgage on the lands involved; that the plaintiffs specifically agreed with the defendants to assume the obligations of the defendants under the Contract for Deed referred to in paragraph V of the complaint and waived any right to complain of the marketability of the title by reason of the fact that legal title was, and is, vested in Bernhard Jannsen and Anna Jannsen and not in the defendant;

That the abstract furnished by the defendants shows a marketable title in the defendants, and the title of the defendants is, in fact, a marketable one within the provisions of the agreement between these plaintiffs and these defendants;

Except as herein specifically admitted, denied or alleged, defendants deny each and every other allegation contained in the [18] first cause of action in the complaint;

Third Defense

Allege that at all times defendants have been ready, willing and able to perform their obligations under the terms of the contract, Exhibit "A" and the agreements made with the plaintiffs referred to in the second defense, but that within a few days after the said contract was made, the plaintiffs determined not to fulfill their obligations under the said contract and agreement and so notified the defendants, and that since said determination by the plaintiffs, the plaintiffs have not been ready, willing or able to carry out their promises under the said contract and agreements;

That more particularly by said contract, Exhibit "A" to the complaint, the plaintiffs agreed to pay to the defendants the balance of the purchase price on June 15, 1953; that on said date the plaintiffs failed to tender to the defendants the said balance of the purchase price; that they were not then, nor have they since been ready, willing or able to perform the conditions of the said contract on their part to be performed; that under the contract time is made of the essence of agreement;

Fourth Defense

That if the plaintiffs did not waive the right to object to the marketability of the title by reason of the lien of the Bitter Root Irrigation District and the United States and by reason of the fact that legal title is vested in Bernhard Jannsen and Anna Jannsen, the defendants had no obligation to show a marketable title until such time as legal title was to pass to the plaintiffs; that under the contract, conveyance of the property to the plaintiffs was to be by contract for deed; that by such provision in the contract it was contemplated by the parties that defendants would fully comply with the contract if, at the time the plaintiffs had paid the payments to the Federal [19] Land Bank and to Bernhard Jannsen and Anna Jannsen, defendants could then deliver to the plaintiffs marketable title; that upon the payment of the several sums agreed to be paid by the plaintiffs under the said contract, full, legal title will vest in the plaintiffs and defendants will

have fully complied with all the provisions of the contract relating to the title conveyed;

Fifth Defense

That at all times defendants have been ready, willing and able to perform their obligations under the terms of the contract, Exhibit "A" and the agreements made with the plaintiffs referred to in the second defense; that defendants will be able to deliver good, merchantable title to the plaintiffs upon the completion of the payments to be made by the plaintiffs under the contract; that plaintiffs have full knowledge of this fact and plaintiffs had full knowledge of the state of the title at the time the contract was entered into and waived any right to object to the marketability of the title so far as the lien of the Bitter Root Irrigation District and United States and insofar as the title of Bernhard Jannsen and Anna Jannsen are concerned; that their objections to the title are not made in good faith but are made for the fraudulent purpose of relieving themselves of their obligations under the contract and for the purpose of unlawfully recovering the part payment made to these defendants;

Answer to Second Cause of Action

As and for their answer to the second cause of action of the complaint herein, defendants allege as follows: defendants incorporate herein by reference all of the allegations of the first, second, third and fourth defenses to the first cause of action, and in

addition, deny and allege as follows: As to paragraph II of the second cause of action, allege that plaintiffs have failed to perform their obligations required under the contract, Exhibit "A"; admit that the plaintiffs entered into [20] the contract Exhibit "A" in good faith intending to purchase the property described therein; allege that within a week after the execution of the contract Exhibit "A" plaintiffs determined that they were not going to perform the obligations devolving upon them by reason of the said contract; allege that plaintiffs defaulted in the performance of their obligation under the contract and deny that such default was in good faith; allege that said defaults in the performance of the obligation of the contract by the plaintiff, were grossly negligent, fraudulent and a willful breach of duty; and deny that plaintiffs are entitled to return of the down payment of Five Thousand Dollars (\$5,000.00) as a relief from forfeiture or otherwise.

In further answer to the allegations of paragraph II of the second cause of action, defendants say that the demand of the plaintiffs for an abstract was not made in good faith; that prior to the execution of the agreement, Exhibit "A", plaintiffs had full knowledge of the existence of the lien of the Bitter Root Irrigation District and of the fact that legal title was vested in Bernhard Jannsen and Anna Jannsen, his wife; that by the contract, Exhibit "A", the plaintiffs specifically assumed the obligations of the defendants under the contract for deed with Bernhard Jannsen and Anna Jannsen,

and that plaintiffs specifically waived any right to object to the marketability of the title to the lands by reason of the lien of the Irrigation District; that the objections of the plaintiffs to the marketability of the title after the examination of the abstract were made in bad faith and with the fraudulent purpose and intent to relieve themselves of their obligations under the said contract; except as herein specifically denied, admitted and alleged, defendants deny all of the allegations of paragraph II of said second cause of action.

For further separate defense to the second cause of action [21] defendants incorporate herein by reference all of the above allegations and denials contained above in the answer to the second cause of action, and in addition, allege that by reason of the failure of the plaintiffs to perform their obligations under the contract, Exhibit "A" to the complaint, the defendants have been damaged in an amount in excess of Five Thousand Dollars (\$5,000.00), and that it would be unjust and inequitable to permit these plaintiffs to recover any part of the Five Thousand Dollars (\$5,000.00) paid by the plaintiffs as the down payment and as a part of the purchase price for the lands involved.

Cross-Complaint

For a cross-complaint, defendants allege:

I.

That the plaintiffs are citizens of the Dominion of Canada; that the defendants are citizens of the

State of Montana; that the amount in controversy herein exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interests and costs;

II.

That on or about the 2nd day of May, 1953, the plaintiffs and the defendants entered into a written contract, a copy of which is attached to the complaint, marked Exhibit "A" and by this reference made a part of this cross-complaint; that the Jannsen farm referred to in said contract consists of the following described tracts of land, to-wit:

The North Half of the Northeast Quarter of the Southeast Quarter ($N\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}$) of Section 34, the West half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$), the Northwest Quarter of the Southwest Quarter of ($NW\frac{1}{4}SW\frac{1}{4}$) of Section 35, Township 10 North Range 19 West of the Montana Principal Meridian.

that on the said 2nd day of May the plaintiffs paid to the defendants the sum of Five Thousand Dollars (\$5,000.00) as a deposit, earnest money and in part payment of the purchase price of the property described and that the plaintiffs have made no [22] other payments under said contract;

III.

That at the time the said contract was made, plaintiffs were aware of the existence of a lien for the construction charges for irrigation structures under a certain contract between the United States of America and the Bitter Root Irrigation District

and entered into the contract for the purchase of the said lands with the understanding and agreement on the part of the plaintiffs that they would assume and pay the said lien when and if it became due, and that plaintiffs waived any right to object to the marketability of the title tendered by the defendants by reason of the existence of the said lien;

IV.

That at the time the contract for the purchase of the lands involved was entered into these plaintiffs knew that legal title to the said property was vested in Bernhard Jannsen and Anna Jannsen and that the defendants held the property under a certain contract for deed, and plaintiffs, by the contract, specifically assumed the obligations of the defendants under the said contract for deed, the said contract for deed being erroneously described in said contract as a mortgage and the plaintiffs specifically waived any right to object to the marketability of the title tendered by the plaintiffs by reason of the fact that the legal title was vested in Bernhard Jannsen and Anna Jannsen;

That under the contract, the land was to be conveyed to the plaintiffs by contract for deed and that upon payment by the plaintiffs of the amounts remaining due to Bernhard Jannsen and Anna Jannsen, title was to vest in the plaintiffs and not until then.

V.

That pursuant to the demand of the plaintiffs, defendants furnished an abstract of title to the

plaintiffs on June 18, 1953; [23] that except for the lien of the Irrigation District, repayment charges referred to above and except for the fact that legal title vests in Bernhard Jannsen and Anna Jannsen, both of which defects, if such they be, were known to the plaintiffs at the time they entered into the contract, as set out above and both of which defects plaintiff acquiesced in and accepted the abstract furnished by the defendants showed marketable title to the real property herein involved within the terms of the contract Exhibit "A" to the complaint and the title to the said lands was marketable on June 15, 1953 and is now marketable within the provisions of the contract, Exhibit "A" to the complaint;

VI.

That defendants have made repeated demands on the plaintiffs that they performed their obligations under the said contract and that they pay to the defendants the balance due under said contract;

VII.

That the defendants were, and have always been, and still are ready, willing and able to perform the agreement on their part;

VIII.

That should the plaintiffs be unable to carry out the terms of the contract and to perform their obligations thereunder and to make the several payments therein specified, the defendants will be damaged in the sum of Five Thousand Dollars (\$5,000.00); that the defendants relying upon the per-

formance of the contract by the plaintiffs refused other offers to sell the said lands to other persons; that the market value of the real estate has gone down since the date of the contract; that the defendants have suffered losses in the farming operations on the said property by reason of the uncertain status of the contract and in the event of the plaintiffs being unable to [24] carry out the terms of this contract, the defendants will be damaged in the above mentioned sum of Five Thousand Dollars (\$5,000.00);

Wherefore, defendants pray judgment:

I.

That the plaintiffs' complaint be dismissed with cost;

II.

That plaintiffs be required to perform said agreement and to pay to the Federal Land Bank and to Bernhard Jannsen and Anna Jannsen the amounts required to be paid by them under the said contract and in the manner provided in said contract, and to pay to the defendants the balance of Eleven Thousand Dollars (\$11,000.00) due on June 15, 1953, with interest on said several sums together with defendants' cost and for such other and further relief as to the court may seem just.

Dated this 29th day of March, 1954.

/s/ LEIF ERICKSON,

Attorney for Defendants [25]

[Endorsed]: Filed March 29, 1954.

[Title of District Court and Cause.]

REPLY AND ANSWER TO CROSS- COMPLAINT

Come now the plaintiffs and for reply to the defendants' cross-complaint on file herein, admit, deny and allege as follows:

I.

Admit the allegations of Paragraphs I and II of said cross-complaint.

II.

Deny the allegations of Paragraphs III and IV of said cross-complaint.

III.

With respect to the allegations of Paragraph V of said cross-complaint, admit that pursuant to the demand of the plaintiffs, defendants furnished an abstract of title to the plaintiffs on June 18, 1953. Deny the remaining allegations of Paragraph V of said cross-complaint.

IV.

Deny the allegations of Paragraphs VI, VII and VIII of said cross-complaint.

Wherefore, having fully replied to defendants' cross-complaint, plaintiffs pray for the relief demanded in the complaint.

/s/ RUSSELL E. SMITH,

Attorney Preparing this Reply

/s/ SMITH, BOONE & RIMEL,

Attorneys for Plaintiffs

[26]

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 6, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court, sitting without a jury, on the 29th and 30th days of November, 1954; the plaintiffs were represented by their counsel Messrs. Smith, Boone & Rimel, and the defendants were represented by their counsel Leif Erickson, Esq.; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence the parties rested and thereafter, within the time granted by the Court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the Court for its consideration and decision, and the Court having considered all the evidence and testimony submitted at the trial and the briefs of counsel, and being fully advised in the premises, now makes and orders filed its

Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That the plaintiffs are citizens of the Dominion of Canada. That the defendants are citizens of the State of Montana. That the amount in controversy herein exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

II.

That on May 2, 1953, plaintiffs and defendants entered into a written contract providing for the sale by defendants and [28] purchase by plaintiffs of the following real property situated in Ravalli County, Montana:

The North Half of the Northeast Quarter of the Southeast Quarter ($N\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}$) of Section Thirty-four (34); West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) and Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$) of Section 35, Township 10 North, Range 19 West, M.P.M.

III.

That on May 2, 1953, plaintiffs paid to defendants the sum of Five Thousand Dollars (\$5,000.00) as a deposit and earnest money in part payment upon the agreed purchase price for said real property. That defendants still retain said amount. That plaintiffs have made no other payments under said contract.

IV.

That said contract of sale was prepared by Pat Hagarty, a real estate agent engaged by and acting for and on behalf of defendants, and that said contract, among other things, provided:

"1. It is further agreed: Seller shall at his expense furnish Purchaser an Abstract of Title continued to a date subsequent hereto showing merchantable title to the above described property vested in Seller, or in lieu thereof, at Seller's option, a title insurance policy insuring title thereto vested in Purchaser, free and clear of all liens and encumbrances, except mortgage to B. Jannsen \$16,-200.00 and Federal Land Bank, \$3563.98.

* * * * *

4. * * * if Seller's title is not merchantable or insurable and cannot be made so within a reasonable time after written notice containing statement of defects is delivered to Seller, then said earnest money herein receipted for shall be returned to the Purchaser on demand and all rights of Purchaser terminated unless Purchaser waives said defects and elects to purchase; * * * "

V.

That no abstract of title was furnished by defendants to plaintiffs before June 11, 1953, on which date plaintiffs wrote to Glenn Woodbury, one of the defendants, requesting that an abstract of title be delivered to plaintiffs or their attorneys. That this abstract of title was delivered on June 18, 1953 to plaintiff's attorneys and that by letter of

June 22, 1953, addressed to defendants, plaintiffs specified certain defects in the title, including: [29] (1) The fact that title to the property was not vested in defendants but rather was vested in Bernhard Jannsen and Anna Jannsen, husband and wife; (2) that the real property was subject to the lien in favor of the United States of America arising out of a contract with the Bitter Root Irrigation District; (3) That, although not shown by the abstract of title, there was a contract of sale from Bernhard Jannsen and Anna Jannsen, husband and wife, to defendants rather than title in the defendants, subject only to a second mortgage in favor of Jannsen and wife.

VI.

That defendants received said letter of June 22, 1953, by which plaintiffs specified certain defects of title and that defendants did not thereafter remedy said defects or communicate with plaintiffs in connection therewith other than to advise plaintiffs by letter of July 30, 1953, that the defects were receiving the attention of defendants' attorneys and that the matter would be promptly taken care of.

VII.

That the abstract of title furnished by defendants to plaintiffs' attorneys on June 18, 1953, bore a final certificate of date June 15, 1953, and that said abstract did not show merchantable title in defendants to the real property which was the subject of said contract of sale and that said abstract

disclosed that record title to said real property was actually vested in Bernhard Jannsen and Anna Jannsen, husband and wife, rather than in defendants and also showed that the property was subject to the lien of the United States of America arising out of a contract with the Bitter Root Irrigation District dated September 16, 1948, and recorded in the Office of the Clerk and Recorder of Ravalli County, Montana, on June 11, 1949 in Volume 13 of Misc., Page 91. That these defects were material, were not excepted in the contract of sale, and rendered the title unmerchantable. [30]

VIII.

That plaintiffs as purchasers have not waived said title defects nor elected to purchase said property notwithstanding said title defects, and that the defendants have failed to remedy said title defects within a reasonable time after receiving written notice thereof through plaintiffs' letter of date June 22, 1953. That plaintiffs made demand upon defendants for return of the \$5,000.00 earnest money paid by plaintiffs under the terms and provisions of said contract of sale, and defendants have failed and refused to return said earnest money.

IX.

That the plaintiffs never received possession of the real property which was the subject of the contract of sale, and that defendants retained possession and also enjoyed the use, rents and profits thereof. That in their relationships with defendants

under said contract of sale, plaintiffs acted promptly and in good faith and were not guilty of grossly negligent, willful or fraudulent breach of duty.

From the foregoing Findings of Fact the Court draws the following

Conclusions of Law

I.

That the Court has jurisdiction hereof.

II.

That defendants were obligated under the contract of May 2, 1953, to furnish plaintiffs an abstract or title insurance policy disclosing merchantable title in defendants to the real property which was the subject of said contract of sale, and that plaintiffs did not become obligated to pay the balance due on the purchase price until said abstract or title insurance policy had been furnished and plaintiffs given a reasonable time to examine the same and then only if merchantable title was shown in defendants, subject only to the exceptions specified in the contract. [31]

III.

That an abstract of title having been furnished, and having been examined and the defects of title

specified to defendants within a reasonable time by the plaintiffs, the defendants thereupon became obligated under said contract to remedy said defects within a reasonable time, or, upon demand, to return the earnest money of \$5,000.00 to plaintiffs.

IV.

That the defects specified by plaintiffs and mentioned in Paragraph VII of the findings herein rendered defendants' title unmerchantable, and the defendants having failed to remedy said defects within a reasonable time, and plaintiffs having demanded the return of their earnest money of \$5,000.00, the plaintiffs are entitled to recover said sum of \$5,000.00 from defendants, together with interest thereon from and after the date of filing their complaint herein.

V.

That in their relationship with defendants under said contract of sale, plaintiffs have acted promptly and in good faith and were not guilty of grossly negligent, willful or fraudulent breach of duty. That plaintiffs have established their right to equitable relief under Section 17-102, R.C.M. 1947, providing for relief from forfeiture, but since plaintiffs were never in possession of the real property which was the subject of the contract of sale, this right to equitable relief is co-extensive with the legal right of plaintiffs as elsewhere recited in these conclusions of law, namely, for the recovery from defend-

ants of the sum of \$5,000.00, with interest thereon from the date of filing the complaint.

Let judgment be entered accordingly, and counsel for the plaintiff is hereby ordered to prepare, submit to counsel for defendants for approval as to form, and present to the Court for signature a form of judgment in accordance with these Findings.

Done and dated this 31st day of January, 1955.

/s/ W. D. MURRAY,

United States District Judge [32]

[Endorsed]: Filed January 31, 1955.

In the United States District Court for the District
of Montana, Missoula Division

No. 382

ALFRED CLERMONT and MARGUERITE I.
CLERMONT, Plaintiffs,

vs.

GLENN WOODBURY AND PEARL WOOD-
BURY, Defendants.

JUDGMENT

This cause came on regularly for trial before the Court, sitting without a jury, on the 29th and 30th days of November, 1954; the plaintiffs were represented by their counsel, Messrs. Smith, Boone & Rimel, and the defendants were represented by their counsel, Leif Erickson, Esq.; thereupon oral and

documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence the parties rested and thereafter, within the time granted by the Court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the Court for its consideration and decision. Thereafter the Court, on the 31st day of January, 1955, made and entered its Findings of Fact and Conclusions of Law herein,

Now Therefore, pursuant to said Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed, and this does order, adjudge and decree, [33] that the plaintiffs have and recover judgment, and that judgment is hereby entered for the plaintiffs, and against the defendants, in the amount of Five Thousand Dollars (\$5,000.00), together with interest thereon at the rate of six per cent (6%) per annum from the 7th day of October, 1953, and plaintiffs' costs herein, to be taxed and settled as provided by law.

Done this 4th day of February, 1955.

/s/ W. D. MURRAY,

Judge

[34]

[Endorsed]: Filed and Entered Feb. 4, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the above named Court and to the Clerk thereof,
and to Alfred Clermont and Marguerite I. Clermont, Plaintiffs and Appellees, and to Messrs. Smith, Boone & Rimel, their Attorneys:

Notice is hereby given that Glenn Woodbury and Pearl Woodbury, defendants above named, hereby appeal to the Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 4th day of January, 1955.

Dated this 2nd day of March, 1955.

/s/ LEIF ERICKSON,

Attorney for Appellants [36]

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know all men by these presents, that we Glenn Woodbury and Pearl Woodbury, as principals, and Adam Felde and Fred T. Porch, as sureties, are held and firmly bound unto Alfred Clermont and Marguerite I. Clermont in the full and just sum of Six Thousand Dollars (\$6,000.00), to be paid to the said Alfred Clermont and Marguerite I. Clermont, their successors, executors, administrators or assigns; to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Signed with our seals and dated this 12th day of February, 1955.

Whereas, on February 4th, 1955, in an action pending in the United States District Court for the District of Montana, Missoula Division, between Alfred Clermont and Marguerite I. Clermont, as plaintiffs, and Glenn Woodbury and Pearl Woodbury, as defendants, a judgment was rendered against the said defendants, and the said defendants having filed a notice of appeal from such judgment in the United States Court of Appeals for the Ninth Circuit;

Now the condition of this obligation is such that if the said defendants shall prosecute their appeal to effect and shall satisfy the judgment in full, together with costs, interest and [37] damages for delay, if any, the appeal is dismissed, or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages that the said Circuit Court of Appeals may adjudge and award, then this obligation shall be void; otherwise to remain in full force and effect.

/s/ GLENN WOODBURY,

/s/ PEARL WOODBURY,

/s/ ADAM FELDE,

/s/ FRED T. PORCH

[38]

Duly Verified.

[Endorsed]: Filed February 15, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellants will rely on appeal are:

I.

The Court erred in refusing to dismiss the complaint for failure to state a claim upon which relief can be granted;

II.

The Court erred in entering judgment for the plaintiffs;

III.

The Court erred in refusing to dismiss the complaint for the reason that neither by the complaint nor the reply did the plaintiffs allege themselves to be ready, willing and able to perform under their contract nor did they allege tender;

IV.

The Court erred in entering judgment for the plaintiffs for the reasons that:

(1) Plaintiffs did not prove they were ready, willing or able to perform under the contract, nor did they approve tender;

(2) The plaintiffs were in default under their contract and defendants were not since defendants could only be placed in default by tender on the part of the plaintiffs or an offer to perform;

(3) Defendants were not required to show marketable title until there had been tender of performance by the plaintiffs;

(4) The Court, in making its findings of fact disregarded [281] the parol evidence explaining the imperfections and ambiguities in the contract;

(5) The defendants were only required to have good title at the time set for conveyance of the lands involved;

(6) The testimony shows without question that the plaintiffs knew, understood and agreed that the Jannsen contract was a contract for deed and not a mortgage, and they expressly agreed to assume the contract;

(7) The plaintiffs were fully informed and were put on notice of the existence of the lien for irrigation construction charges. If they were not, under the terms of the contract, their lien of the irrigation construction charges could have been paid out of the purchase money;

(8) The evidence established that defendants had suffered damage by reason of the failure of the plaintiffs to carry out their contract in excess of the down payment.

Dated this 12th day of May, 1955.

/s/ LEIF ERICKSON,

Attorney for Defendants-Appellants

[Endorsed]: Filed May 16, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 283 pages numbered consecutively from 1 to 283 inclusive as a full, true and correct transcript, consisting of the original following papers designated by the parties, to-wit: Complaint, Motion to Dismiss, Order Denying Motion to Dismiss, Answer and Cross-Complaint, Reply and Answer to Cross-Complaint, Findings of Fact and Conclusions of Law, Judgment, Notice of Appeal and Bond, the Transcript of Testimony, all Exhibits listed in numerical order except the Abstract, Statement of Points and Designation of Contents of Record on Appeal, required by the rule as the record on appeal in Case No. 382, Alfred Clermont and Marguerite I. Clermont vs. Glenn Woodbury and Pearl Woodbury, as appears from the original records and files of said District Court in my custody as such Clerk.

Witness my hand and the seal of said District

Court at Butte, Montana, this 27th day of May, 1955.

[Seal]

H. H. WALKER,
Clerk

/s/ By D. F. HOLLAND,
Deputy Clerk

In the United States District Court, District of
Montana, Missoula Division

No. 382

ALFRED CLERMONT and MARGUERITE I.
CLERMONT, Plaintiffs,

vs.

GLENN WOODBURY and PEARL WOOD-
BURY, Defendants.

TRANSCRIPT OF PROCEEDINGS

The above cause came on regularly for trial before the Honorable W. D. Murray, United States District Judge for the District of Montana, sitting without a jury, at Missoula, Montana, on November 29, 1954. The plaintiffs were present in person and represented by their counsel, Messrs. William T. Boone and J. W. Rimel, of Missoula, Montana, and the defendants were present in person and represented by their counsel, Mr. Leif Erickson, Helena, Montana.

Thereupon, the following proceedings were had:

Court: Number 382, Clermont vs. Woodbury.

Mr. Boone: If your Honor please, may we have about a 10 minute recess before we start that action?

Court: Court will stand in recess until 25 minutes after 10.

(Ten-minute recess.) [41]

Mr. Erickson: May it please the Court, at the outset, I have advised counsel that in my prayer for relief in the cross complaint, I have misstated the balance that would be due as \$6,000.00, and that figure should be \$11,000.00——

The Court: Very well.

Mr. Erickson: ——because under the contract itself and everything that appears in the pleadings shows that would be the correct amount, so at this time I move to have the cross complaint amended to change that figure to \$11,000.00.

Court: Very well, the amendment is ordered.

Mr. Boone: Does your Honor desire an opening statement?

Court: I don't think so: I think that we covered it, didn't we? In reference to the motion to dismiss, we have covered the picture generally. I think you can proceed.

Mr. Boone: Very well. If your Honor please, at this time the plaintiffs offer in evidence what has been marked for identification as Exhibit 1, which is an abstract of title, No. 9209, to the lands described in the complaint, the same bearing Abstracter's Certificate of date June 14, 1953, 5:00 o'clock p.m. of the Ravalli County Abstract Company. In making this offer, your Honor, this ab-

abstract is held in escrow with the Federal Land Bank in Spokane, and has been withdrawn from escrow for the purposes of this case, and I would like to have it admitted with the understanding that at the conclusion of the trial and decision of the Court, the abstract may be withdrawn [42] for the purpose of being returned to the Federal Land Bank.

Mr. Erickson: That is agreeable.

Court: Very well.

(Plaintiff's Exhibit 1, being Abstract of Title No. 9209, covering lands involved, was here received in evidence, and will be certified to the Court of Appeals by the Clerk of this Court.)

ELSIE W. OLIVA

called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Boone): Will you state your name to the Court, please? Just sit down.

A. Elsie W. Oliva.

Q. Your residence, please?

A. Hamilton, Montana.

Q. And what position do you hold with the Bitterroot Irrigation District?

A. I am secretary.

Q. And as secretary, do you have in your possession the books and records and documents of the district? A. I do.

Mr. Boone: And it has been agreed between counsel, your Honor, that rather than take the time

(Testimony of Elsie W. Oliva.)

to have this witness [43] testify to various facts that it may be stipulated as to those facts as follows: First, that the number of irrigable acres within the Bitterroot Irrigation District is 16,665 acres; that of the lands described in the plaintiffs' complaint, 121 acres of those lands are within the Bitterroot Irrigation District; that prior to July 1, 1953, and during the month of June, 1953, the amount owing to the United States under the repayment contract pleaded in the plaintiffs' complaint was \$39.26 per acre for each acre under the District and subject to the repayment contract; that the amount owing to the United States on the lands described in the plaintiffs' complaint and subject to the repayment contract would then be 121 acres at \$39.26 per acre; that on July 1, 1953, the district made a payment to the United States of 89 cents per acre for each acre under the repayment contract, leaving a balance of construction charges due to the United States after July 1, 1953, of \$38.37 per acre, which would apply to the 121 acres within the lands described in the plaintiffs' complaint. Is that correct?

Mr. Erickson: I would like to add just one little variation in the stipulation. I don't anticipate we will be met with the problem on the lands at some later date as to the actual amount owing, for example with the District, but I would like to have the stipulation in the form that if this witness testified, she would testify her records show that. I [44] don't want to be in the position of admitting to the

(Testimony of Elsie W. Oliva.)

accuracy of that; that her records would show that figure.

Mr. Boone: Very well.

Court: Very well.

Mr. Boone: Now, if your Honor please, counsel has requested that while this witness is on the stand that there be offered and introduced in evidence, to which I have no objection, a copy of the repayment contract, which has been identified as the plaintiffs' Exhibit 2, but which should be introduced as a defendants' Exhibit. We have no objection.

Court: Are you now through with the witness?

Mr. Boone: Yes, I am through.

Mr. Erickson: I now offer proposed Exhibit 1 for the defendants, being the contract.

Court: Very well, it is admitted.

(Defendants' Exhibit 1, being copy of contract between United States and Bitterroot Irrigation District, dated September 16, 1948, was here received in evidence and will be certified to the Court of Appeals by the Clerk of this Court.)

[See pages 224-255.]

Mr. Boone: It may be stipulated that that is a true and correct copy of the contract with the exception of certain exhibits that were added to the original, and also to the execution, which we admit was properly executed.

Mr. Erickson: That is my understanding of what we have stipulated to.

(Testimony of Elsie W. Oliva.)

Court: Very well. [45]

Mr. Boone: That is all.

Cross Examination

By Mr. Erickson:

Mr. Erickson: So we may dispose of the witness, I wonder if I may ask a question or two which aren't properly cross examination, but I believe it would expedite the matter and we could release the witness?

Court: If there is no objection.

Mr. Boone: No objection.

Q. Does it occur that land is taken out of the district so it is no longer subject to the lien?

A. No, we have to get the permission of the Secretary of Interior.

Q. But I asked you does it happen?

A. It happens occasionally, yes.

Mr. Erickson: That is all.

Redirect Examination

Q. (By Mr. Boone): When was the last time it did happen, Mrs. Oliva? A. In 1948.

Q. I see; and the 121 acres which I have referred to are still within the district?

A. Yes, sir, they are. [46]

Q. In whose name are those?

A. Bernhard and Anna Jannsen, isn't that the name?

Mr. Boone: That is all

(Testimony of Elsie W. Oliva.)

Recross Examination

Q. (By Mr. Erickson): May I refresh the witness' memory? Wasn't there a more recent case in which Mr. Shallenberger appeared as counsel where land was taken from the district?

A. Yes.

Q. Do you recall the approximate date of that?

A. Wouldn't that be 1952?

Q. That would be your recollection, about 1952?

A. Yes.

Mr. Erickson: That is all.

Mr. Boone: That is all.

Court: Step down, call the next witness.

(Witness excused.)

MARGUERITE IRENE CLERMONT

one of the plaintiffs, called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Boone): Will you state your name, please?

A. Marguerite Irene Clermont.

Q. You are one of the plaintiffs in this action against Glenn Woodbury and Pearl Woodbury?

A. Yes, sir.

Q. Where do you live at the present time, Mrs. Clermont?

A. In Harrison Hot Springs, B. C.

Q. British Columbia? A. Canada, yes.

Q. And did you and your husband come to Mon-

(Testimony of Marguerite Irene Clermont.)

tana, then, for the purpose of the trial of this action? A. Yes, sir.

Q. I am handing you, Mrs. Clermont, an instrument which has been marked for identification as Plaintiffs' Exhibit 2, and I will ask you if you can identify the signatures on that? A. Yes.

Q. Are they signatures of you and your husband? A. Yes, they are.

Q. Was that a letter which was regularly mailed in the United States mail to Mr. Glenn Woodbury at Stevensville, Montana? A. Yes, sir.

Q. With postage prepaid? A. Yes.

Mr. Boone: We now offer in evidence Plaintiffs' Exhibit 2. [48]

Mr. Erickson: No objection.

Court: It is admitted.

PLAINTIFFS' EXHIBIT No. 2

"Huson, Montana, June 11, 1953

"Mr. Glenn Woodbury
(Three Mile District)
Stevensville, Montana.

"Dear Mr. Woodbury:

"With regard to the receipt and agreement to sell and purchase entered into on May 2, 1953, between you and Mrs. Woodbury, as Sellers, and us, as Purchasers, you are advised that we have not as yet been provided with an abstract of title to the ranch property described in the agreement.

"The agreement provides that the Seller shall at his own expense furnish the purchaser with an ab-

(Testimony of Marguerite Irene Clermont.)

stract of title, continued to a date subsequent to the agreement, showing merchantable title to the farm property listed in the Seller, free and clear of all liens and encumbrances except the mortgage to Jannsen and Federal Land Bank.

“The agreement also calls for a payment to you from us on June 15, 1953.

“You can understand that we will not make the payment to you until the abstract is provided as the agreement calls for, and until an opportunity is had for our attorneys to examine the same to determine whether your title is merchantable.

“The attorneys whom we have selected to examine the abstract for us are Smith, Boone & Rimel, First National Bank Building, Missoula, Montana, and instead of sending the abstract to us, you may deliver it to the attorneys. We have advised them that the abstract will be forthcoming.

“Very truly yours,

/s/ Alfred Clermont

/s/ Marguerite I. Clermont.” [49]

Mr. Boone: This is a letter which makes demand for the abstract. May I see the Court file?

Q. Mrs. Clermont, there was attached to your complaint in this action an exhibit which was designated as Exhibit No. “B”, which was a letter signed by you and Mr. Clermont on June 22, 1953, to Mr. Glenn Woodbury. Will you please tell the Court whether you received any response to this letter of June 22nd, either by mail or telegram or oral com-

(Testimony of Marguerite Irene Clermont.)
munication at any time after sending it and prior to July 27, 1953?

A. No, we heard nothing.

Q. You heard nothing. Did you hear anything from Mrs. Woodbury with respect to that letter?

A. No, I didn't.

Q. Now, then, referring to the letter which is marked Exhibit "C" attached to the complaint, a letter signed by you and your husband to Mr. Woodbury and his wife, did you receive any communication from either Mr. or Mrs. Woodbury after sending this letter on July 27th, any communication of any kind, either by telegram, letter, or oral, before the receipt of the letter, Exhibit "D", after July 30, 1953?

A. No, we heard nothing.

Q. I see. Now, you did receive the letter which is attached to the complaint as Exhibit "D" from Mr. and Mrs. Woodbury, did you not?

A. Yes. [50]

Q. Now, after the receipt of that letter, was there any communication from either Mr. or Mrs. Woodbury, or both of them, or from any attorney representing them, concerning the matters which were the subject of these previous letters up until the time the complaint in this action was filed?

A. No, at no time.

Q. Did you receive any letter or telegram or oral communication whatsoever? A. No.

Q. Either from the Woodburys or from any attorneys representing them?

(Testimony of Marguerite Irene Clermont.)

A. No, never.

Q. The contract, which is attached to the complaint, Mrs. Clermont, as Exhibit "A", will you tell the Court by whom that contract was prepared?

A. By Mr. Hagarty.

Q. And who was he, please?

A. He was our real estate agent.

Q. Who was he representing?

A. Mr. and Mrs. Woodbury.

Q. Did you or Mr. Clermont employ him in any capacity?

A. We just went to see him to look over some property.

Q. He was representing Mr. and Mrs. Woodbury? A. Yes.

Q. And he prepared the contract? [51]

A. Yes.

Q. Exhibit "A"? A. Yes.

Q. Now, Mrs. Woodbury, or Mrs. Clermont, not having heard from either Mr. or Mrs. Woodbury after that letter of July 30th, which you received, what did you and Mr. Clermont do with respect to moving back to Canada?

A. After thinking it over and having heard nothing, no encouragement that this was going to be satisfied so we would be free and feel free to work this particular farm in which we were interested, we decided by that time, knowing more of the ways of living in Canada, and being more acquainted with their ways, we decided we should return to Canada to seek some way of making our living,

(Testimony of Marguerite Irene Clermont.)
and the school term was approaching and we had to get our children, of which we have five, into school, and we were waiting and waiting, and we waited until the 23rd of August to leave here, and crossed the lines on the 7th of September.

Q. Now, after this contract, Exhibit "A" was signed, did either you or Mr. Clermont have possession of the ranch properties involved in this proceeding?

A. No, we never worked the farm.

Q. And you had no assurance that the transaction was going to be closed?

Mr. Erickson: To which we must object—

Mr. Boone: Very well.

Q. Now, pending—or I should put it the usual way—waiting to hear from the Woodburys with respect to these title problems, will you please tell the Court whether or not you and your husband incurred any expense? A. Yes.

Mr. Erickson: To which we object on the ground it is not material and relevant.

Mr. Boone: It is pleaded, your Honor, under the second cause of action.

Court: Very well. Overruled.

A. Do I answer that now?

Court: Yes, you may answer.

A. Yes, we spent a great deal of money.

Q. Will you just relate generally to the Judge as to what inconvenience and expense you were put to?

Mr. Erickson: We will object on the further

(Testimony of Marguerite Irene Clermont.)

grounds there is no proper foundation, nothing to indicate that the expense was incurred by reason of anything connected with this lawsuit.

Court: Well, I think we will have to hear the evidence to find that out. You may proceed and answer.

A. Yes, we had to go to a great deal of expense. After all, we had parted with a good sum of money, and it took our cash balance down as, I should say so low that it was very difficult for us to find anything else. Property is high here and in [53] Canada; less in Canada, of course.

Mr. Erickson: I am now going to move to strike the testimony of the witness. It is not responsive.

Court: Yes. I think that your position is correct. If you will direct it more specifically.

Q. What I am inquiring about specifically, Mrs. Clermont, is the matter of inconvenience and expense you and your husband were put to during the period you were waiting for some response with respect to the title problems before you did go back to Canada.

A. Yes. We, in the meantime, were working for a farmer at Huson, Montana, and after all, we were not making what we figured we would have made if we had a property of our own, so we were just barely eking a living at the time, and also, we had a great medical expense at that time. We had to go back and forth to Stevensville several times. We were into Missoula several times, and that cost money, too.

(Testimony of Marguerite Irene Clermont.)

Mr. Erickson: At this time I move to strike that answer.

Court: I don't see its materiality.

Mr. Boone: All right, your honor.

Q. Now, at the time of returning to Canada in September, 1953, you made your residence there from that date to the present, did you?

A. Yes.

Q. Have you taken up any business or occupation during that [54] period of time?

A. Yes.

Q. What has been done in that respect, please?

A. So after we passed the lines, we secured a job near Vancouver, near Westminster, I should say, on a farm for a short while, and then started to look around to find something to make a living with with the few dollars we had left, so we found and bought the stock of a small grocery store, and that is now our livelihood.

Q. You are at the present time operating that store?

A. Yes.

Q. Now, would you tell the Court whether your taking that grocery store, starting that livelihood was as a result of not having any action with respect to these statements of defects of title?

A. Yes, because we wanted a farm, we didn't want a grocery store, but that is the business that was easiest for us to get into, as buying a small stock of groceries isn't as expensive as buying a farm. It is not what we liked, it is what we were forced to.

(Testimony of Marguerite Irene Clermont.)

Q. Should, at any time in the future, the Woodburys announce that they were in a position to convey the title they had contracted to convey to you, would you tell the Court whether you could then assume that contract, or whether it would be at great inconvenience and expense to you? [55]

A. Yes, for more than one reason. First of all, you can't dispose of this property any time you desire. It will take time, and consequently, we will lose some money if we should try and hurry it; and again, we were immigrants to this country in the spring of 1953, and when we once applied for an immigration visa, I understand that after you return, like to Canada, you renounce your visa, and it will take a period of near five years before we may apply for a second visa, which is not guaranteed by the United States Government.

Mr. Erickson: I move to strike the evidence from where she says "she understands" with relation to the immigration.

Court: Well, I understand it too, so.

Mr. Erickson: Very well.

A. That is through talking to the Immigration Bureau.

Court: Witnesses are not permitted to tell us what the law is.

A. No, that is what they tell us.

Mr. Erickson: I am only saving my record on this, your Honor, because I realize that the Court is going to eliminate what is irrelevant, immaterial,

(Testimony of Marguerite Irene Clermont.)

or improper, but I don't want to be in the position of having it admitted by my silence.

Court: Yes, I think you are right and should call it to my attention, and in fact, that portion of the answer is stricken.

Q. At the time this contract was entered into, Mrs. Clermont, [56] you and your husband paid the Woodburys \$5,000.00? A. Yes.

Q. Has that \$5,000.00, or any portion of it, ever been returned to either one of you? A. No.

Mr. Boone: That is all.

Cross Examination

Q. (By Mr. Erickson): Mrs. Woodbury—Mrs. Clermont—I followed counsel—Mrs. Clermont, you were working on a farm at Huson, Montana, at the time negotiations started that resulted in this contract, were you not? A. Yes.

Q. You continued to work there until August 23, 1953, would you say? A. That's right.

Q. Now, in relation to the responses you may have gotten to the letters beginning with the letter of June 11th, who prepared the letter of June 11th?

A. Mr. Boone.

Q. And, as to the letter which is, I believe, the next letter, dated June 22nd, who prepared that letter? A. Mr. Boone.

Q. And who prepared the letter of July 27th?

A. Mr. Boone.

Q. So, that from June 11th and from there on,

(Testimony of Marguerite Irene Clermont.)

the matter was in the hands of your attorneys, was it not? A. It was.

Q. Do you know whether your attorneys ever got any response from Mr. Woodbury or anybody representing him? A. No.

Q. That is something outside of your knowledge?

A. They have never received anything that I know of that I have ever been told. We were in constant contact with him at all times.

Q. You don't know whether there were conferences between Mr. Boone and Mr. Claude Johnson.

A. I have never heard the name of Mr. Johnson.

Q. You don't know whether there were any conferences between the law firm of Boone, Smith and Rimel, and the law firm of Murphy, Garlington and Whitlock?

A. I have never heard of any.

Q. Now, you said that at the time you left here, by reason of the payment made to Mr. and Mrs. Woodbury, you didn't have very much money, is that true?

A. Not as much as we would have needed.

Q. How much money did you have?

A. At the time our wheat payments had come in. We had, I believe we crossed with close to \$12,000. [58]

Q. Did you have——

Mr. Boone: Just a minute, were you finished?

A. Yes.

(Testimony of Marguerite Irene Clermont.)

Q. Did you have that amount of money available on June 15, 1953?

A. We had more than that.

Q. Mrs. Clermont, you spoke of Mr. Hagarty, and I believe you testified it was through Mr. Hagarty you entered into negotiations to purchase this farm, is that true?

A. Yes, first of all, I should say we met a restaurant operator—I don't know his name——

Q. At Stevensville?

A. Yes, and we asked him for the name of a real estate man there in town, as we liked the country, and he referred us to Mr. Hagarty.

Q. Did you go then to see Mr. Hagarty?

A. Yes.

Q. Who all was in that party that went to see Mr. Hagarty at that time?

A. Just my husband and myself.

Q. And do you recall the approximate date?

Mr. Boone: Objected to, your Honor, as improper cross examination.

Court: Overruled.

A. I don't remember. [59]

Q. You don't recall the date?

A. No, it would be a few days before.

Q. The contract bears date May 2, 1953, and you would say it would be a short time before that?

A. Just a few days before, yes.

Q. Now, when you went to see Mr. Hagarty, did you have any conversation concerning this particular piece of property? A. Yes.

(Testimony of Marguerite Irene Clermont.)

Q. What was that conversation?

Mr. Boone: Objected to as improper cross examination.

Mr. Erickson: May it please the Court, I am somewhat puzzled myself as to the proper method of procedure. As I visualize this case, I think that is what it is going to turn on. We feel the contract itself is so indefinite and the terms so contradictory, and on general rules of marketability, we have considerable latitude in showing the Court the circumstances under which this contract was prepared.

Court: Yes, I think you examined with reference to whether or not Mr. Hagarty was representing her, and as to that you may proceed, and what the conversations were will disclose who he was representing; if he prepared the contract, who was to be bound by the more strict interpretation of the contract. I think that is all a matter for the Court to be advised upon.

Mr. Boone: Our direct examination did not cover any subject of negotiations between the parties. That was my point. [60]

Mr. Erickson: I believe if we proceed in a more orderly fashion—if he didn't examine Mrs. Clermont on that, I will not ask her any more questions about that at this time, and present my witnesses as to that feature because——

Court: Very well.

Mr. Erickson: Because we are willing to agree that Mr. Hagarty was representing the seller in the matter of the preparation of the contract.

(Testimony of Marguerite Irene Clermont.)

Q. Mrs. Clermont, do you know whether or not Mr. Woodbury offered a job to Mr. Clermont during the period between May 2nd and the time the contract was to be performed, or June 15th?

Mr. Boone: Objected to as improper cross examination.

Mr. Erickson: She has testified about having worked for low wages at something on a farm.

Witness: I beg your pardon, not low wages.

Court: I think it was all so indefinite that it didn't mean anything, to tell the truth.

Mr. Rimel: I believe it was stricken.

Mr. Erickson: I will withdraw the question. That is all, Mrs. Clermont.

(Witness excused.)

ALFRED CLERMONT

one of the plaintiffs, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Boone): Will you state your name to the Court, please?

A. Alfred Clermont.

Q. You may sit down. You are one of the plaintiffs in this action, the husband of the lady who just testified?

A. Yes.

Q. You have to answer these questions, Mr. Clermont. Just sit down. You are the husband of the lady who just testified here?

A. Yes.

Q. Now, referring for the moment, Mr. Cler-

(Testimony of Alfred Clermont.)

mont, to the letter of June 22, 1953, which is the Exhibit "B" to your complaint, signed by you and your wife, after that letter was written, did you receive any communication from either Mr. or Mrs. Woodbury, or anyone acting in their behalf, either by letter or by telephone, or by telegram, or any other way, before this letter of July 27, 1953?

A. No.

Q. Now, after the letter of July 27, 1953, which you and your wife signed to the Woodburys, the letter being Exhibit "C" to the complaint, did you receive any communication to that letter other than the letter of July 30, 1953, from Mr. or Mrs. Woodbury?

A. No. [62]

Q. That letter of July 30th is Exhibit "D" to the complaint. Did you receive any communication whatsoever from either Mr. or Mrs. Woodbury by letter, telegram, telephone conversation, or otherwise?

A. No.

Q. Now, after the letter of July 30, 1953, from Mr. and Mrs. Woodbury, did you receive any communication by letter, telegram, or otherwise, from Mr. or Mrs. Woodbury before you and your wife went back to Canada?

A. No.

Q. Now, this action, as I recall it, was filed in October. Will you tell the Court whether you received any communication from Mr. or Mrs. Woodbury, or anyone acting in their behalf, up until the time this action was filed?

A. No.

Q. Now, you have set up in your complaint that at the time the contract was signed with the Wood-

(Testimony of Alfred Clermont.)

burys, attached as Exhibit "A" to the complaint, you and your wife paid a \$5,000.00 deposit?

A. Yes.

Q. Have you ever gotten that deposit back from the Woodburys, or any part thereof, up to the present time? A. No.

Mr. Erickson: I am going to object to the question on this ground: only as to his designation of it as a deposit. The contract will speak what it is. [63]

Mr. Boone: Well, the payment, then.

Court: The objection is overruled. I can distinguish—I mean that is a question I am going to have to decide, and the use of the word is just in order to permit the flow of testimony. No significance will be given to the word as it is used by a witness in that regard.

Q. Have you received that money back, or any part of it? A. Not at all.

Mr. Boone: You may examine.

Cross Examination

Q. (By Mr. Erickson): Mr. Clermont, the \$5,000.00 that was paid, did you pay that all to Glenn Woodbury?

A. Now, if I remember right, I think Mr. Pat Hagarty had one check for \$1,000.00 and Mr. Woodbury \$4,000.00.

Q. And Mr. Pat Hagarty is the gentleman that has been identified here as a real estate agent, is that correct? A. Yes.

Q. Do you know how he happened to be paid the \$1,000.00? A. A check.

(Testimony of Alfred Clermont.)

Q. Why was he paid \$1,000.00?

Mr. Boone: Objected to as immaterial.

Court: Overruled.

A. Well, it is earnest money. [64]

Q. Do you know whether or not that was paid to Mr. Hagarty as the real estate man's commission?

A. I don't know just how he took it, but he took it, that is all I can say.

Q. There was no discussion that that was Mr. Hagarty's commission for arranging the sale?

A. No.

Q. You are sure about that?

A. Well, like I say, I just made him two checks.

Q. Now, you never were—were you ever in possession of the property?

A. No, I don't think I was.

Q. Were you ever offered possession by Mr. Woodbury?

Mr. Boone: That is objected to as improper cross examination.

Court: Sustained.

Q. Now, calling your attention to the letters to which you have testified, and you heard your wife testify, would your testimony be the same that those letters were prepared by Mr. Boone, the three letters, one of June 11th, and June 22nd and July 27th?

A. Yes.

Q. And do you know whether Mr. Boone or anyone else in his firm received any communications

(Testimony of Alfred Clermont.)

from Mr. Woodbury or Mrs. Woodbury after June 15th? [65]

A. Yes.

Q. What do you know about that, Mr. Clermont? A. Received?

Q. I meant by that do you know whether or not attorneys representing Mr. Woodbury, or Mr. Woodbury himself, discussed this matter with your attorneys after June 15th.

A. I don't think so.

Q. Do you know whether or not—that is all I am asking you is whether you know that the matter was discussed, the matter of the title and so forth, by Mr. Woodbury and Mr. Boone, or by people representing Mr. Woodbury? A. No, no.

Q. You know nothing about that. Did Mr. Boone or anyone from his firm advise you there were any negotiations taking place about the contract or about the title after June 15th? A. No.

Q. Had you ever heard the name Claude Johnson? A. No.

Q. Have you heard of the law firm in connection with this case of Murphy, Garlington and Pauly? A. No.

Q. Mr. Clermont, the letter of June 11th, can you tell us how that happened to be written? That is the letter, if you will remember, Mr. Clermont, and I think it is Exhibit 2, which is the letter you have already seen. Do you know how that [66] happened to be written?

Mr. Boone: That is objected to as improper cross

(Testimony of Alfred Clermont.)

examination, no questions were asked this witness with respect to that letter.

Court: Sustained.

Mr. Erickson: It was my understanding that Mr. Clermont testified he was a signer of the letter, and it was his letter, and that is the reason I felt I was entitled to ask questions as to how he happened to have that letter written; and it obviously appears to be his letter and was introduced on behalf of the plaintiffs.

Mr. Boone: I only questioned the witness with respect to the letters attached to the complaint.

Court: That is as I recall it.

Mr. Erickson: That is all I have.

Court: You may be excused. Call the next witness.

(Witness excused.)

Mr. Boone: The plaintiffs rest, your Honor.

Mr. Erickson: Call Glenn Woodbury.

GLENN WOODBURY

one of the defendants, called as a witness on his own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Your name is Glenn Woodbury? A. That's right.

Q. And you are one of the defendants and cross complainants in this action, is that true?

A. Yes.

(Testimony of Glenn Woodbury.)

Q. You reside in the Three Mile District near Stevensville? A. Yes.

Q. Mr. Woodbury, you own two ranches there, is that true? A. Yes.

Q. And one of them is your home ranch called the Porch Ranch, is that true? A. Yes.

Q. And that is a relatively larger ranch, is that true? A. That's right, yes.

Q. Now, the property here involved is spoken of as the Jannsen place, is that correct?

A. Yes.

Q. Where is that with relation to your home place?

A. Well, it corners with the home place, the part I live on. The northeast corner of the Jannsen place joins the southwest corner of the Porch place.

Q. And both of those places lay in a little valley, do they not? A. Yes, more or less.

Q. Is there a stream going through both places?

A. Yes.

Q. What is the name of that stream?

A. Well, Three Mile Creek is the main stream.

Q. How far is the Jannsen place from what is called the Big Ditch?

A. Oh, at the closest point, I suppose it would be between, some place between a quarter and half a mile.

Q. Can you see the Big Ditch from the Jannsen place? A. Very easily.

Q. And is it out of the Big Ditch that the Jannsen place is irrigated? A. Yes, it is.

(Testimony of Glenn Woodbury.)

Q. And I think the testimony is it is about 120 acres of irrigable land, is that true? A. 121.

Q. Now, you bought that property from a man by the name of Jannsen, is that correct?

A. Yes.

Q. Did you have a legal title to that property?

A. I thought I did.

Q. Well, I mean by that, under what kind of instrument do you hold that property?

A. A contract for deed.

Q. And did you furnish to Boone, Smith and Rimel a copy of the contract for deed at the time you furnished them with a copy [69] of the abstract? A. I did.

Q. And showing you that contract for deed, is this the original which you have in your possession that I am designating here? A. Yes.

Q. That is an original signed copy?

A. Yes.

Q. Now, the copy you furnished to Boone, Smith and Rimel has on it, in addition to what is on the original, a notation in fine type, "This is to certify that the attached is a true and correct copy" and so forth of the original, is that the one you furnished to them? A. Yes.

Q. Where did you secure that?

A. From Attorney Brown in Stevensville.

Q. Is he the gentleman that prepared the original? A. Yes.

Q. And by comparison, is this copy the same as the original?

(Testimony of Glenn Woodbury.)

A. Yes, I suppose it is; it is supposed to be. It is a certified copy. I didn't check it word for word.

Mr. Erickson: I now offer Defendants' Proposed Exhibit 2, which is the copy to which I have made reference.

Mr. Rimel: No objection.

Court: It is admitted. [70]

(Defendants' Exhibit 2, being copy of agreement dated April 24, 1953, between Bernhard and Anna Jannsen and Glenn A. and Pearl Woodbury, was here received in evidence, and will be certified to the Court of Appeals by the Clerk of this Court.)

[See pages 255-259.]

Q. Mr. Woodbury, are your payments under that contract paid up to date? A. They are.

Mr. Boone: Objected to as immaterial.

Court: Overruled.

Q. Now, you are acquainted with Mr. Clermont?

A. Yes.

Q. When did you first meet Mr. Clermont?

A. May 2, 1953.

Q. And where did you meet him?

A. On the Jannsen property.

Q. And whereabouts there?

A. Well, out in a pea field that I was planting to peas.

Q. Was anyone else present beside yourself and Mr. Clermont when you became acquainted?

A. Mr. Hagarty and a fellow by the name of Roy Marie, I believe.

(Testimony of Glenn Woodbury.)

Q. Was Mrs. Clermont present at that time?

A. Yes.

Q. And was there anyone else there?

A. Some of their children were with them. I wouldn't say whether they were all there or not.[71]

Q. Did you at that time have a conversation with Mr. Clermont?

A. Yes, I did.

Q. And what was the conversation about?

Mr. Rimel: Your Honor, to which we object, as any oral conversation preceding the execution of the written contract would become a part of and merged in the contract, and, therefore, not properly admissible to vary the terms of it.

Mr. Erickson: I believe the objection is the crux of this whole case, your Honor, and the view we take of it, if I may address myself to the Court on it, is two or three pronged. In the first place, we think a reading of the contract shows it is one of those which is so ambiguous and so contradictory in its terms that the parol evidence rule permits of oral testimony for two purposes. One of them, of course, is to show what the real agreement is since it can't be determined from the contract itself, and the other is to put the Court in the same position as the parties when the Court tries to construe this contract and give it a construction that will make it an instrument that has meaning. Then, in addition to that, we take the view that any of this testimony, and I propose to examine this witness and others, if I may, in some detail as to just exactly what this was all about, because in the contract it is provided

(Testimony of Glenn Woodbury.)

there be furnished an abstract showing marketable title, and the authorities are uniform in the matter of construing that language, you may introduce parol evidence to show what the [72] parties intended at the time to be a marketable title. Then, there is an additional reason for examining witnesses on all of these points. The language as to the abstract says the abstract shall be furnished continued to a date subsequent thereto, and nothing further, no date or anything else fixed on it. Then, we think finally all of this testimony is admissible because we have pleaded in our complaint that there was a fraudulent purpose on the part of Clermont in his actions here, and there is a mistake in the language of the contract itself; and then finally we take the view that since this is an action in which we ask for specific performance, as well as defending, that we have the usual latitude in the matter of evidence, and that is our basic position, your Honor.

Mr. Rimel: May we be heard?

Court: Yes.

Mr. Rimel: We likewise take a three pronged position in this matter. In the first place, we don't feel this contract with respect to the question of furnishing the abstract, is ambiguous. The contract in Paragraph 1 clearly requires that the seller shall, at his expense—and it is paragraph 1 in the series, it is the first paragraph in the contract, the first thing to be done, “Seller shall at his expense furnish Purchaser an abstract of title continued to a date subsequent hereto showing merchantable title

(Testimony of Glenn Woodbury.)

to the above described property vested in Seller, or in lieu thereof, at Seller's option, [73] "a title insurance policy insuring title thereto vested in Purchaser, free and clear of all liens and encumbrances, except mortgage to B. Jannsen, \$16,200.00, and Federal Land Bank \$3,563.98. It is further agreed that the broker assumes no responsibility in regard to the title and broker recommends that Purchaser have the abstract of title or title insurance policy examined by an attorney." Paragraph 4, and I do emphasize the "4", because it follows somewhat lower in the contract, provides in part, and the part I am leaving out is irrelevant, "If Seller's title is not merchantable or insurable and cannot be made so within a reasonable time after written notice containing statements of defects is delivered to Seller, then said earnest money herein receipted for shall be returned to the Purchaser on demand, and all rights of Purchaser terminated unless Purchaser waives said defects and elects to purchase;". Your Honor, there is the first point that this contract is clear on what is to be done. Paragraph 1 in a series provides that the Seller shall furnish an abstract, and the broker recommends that the Purchaser have the abstract examined, so that is something to be done while the broker is still in the picture. The time contemplated there is the preliminary stages. Paragraph 4, much later in the series, provides that if the Seller's title is not merchantable and cannot be made so within a reasonable time after notice of defects, that then said earnest money receipted for

(Testimony of Glenn Woodbury.)

shall be returned to the Buyers. [74] Your Honor, that did not contemplate any further payment. It says, "Said earnest money which is receipted for herein." It doesn't say "Said earnest money and any other payments," so the contract, we feel, clearly by the language of Paragraphs 1 and 4, requires the abstract of title and the merchantability of that title be shown before the Buyers are required to do anything further under the contract.

Secondly, your Honor, we urge this point upon the Court: As the Court and counsel know, the interpretation that the parties themselves put upon a contract or agreement is of strong influence with any Court in determining what is to be done thereunder, and I might cite a case or two to the Court on that. The case of Cook-Reynolds Company vs. Beyer, 107 Mont. page 1, is such a case, and there are many in Montana; and here the Court can see through the pleadings themselves and things that are admitted in the pleadings that on May 2nd this contract was executed, that on June 11, 1953, the defendants not having furnished abstracts of title, the plaintiffs, by letter, made request for the abstract, and it is admitted that was done. Now, the next thing that happens is that on June 18th, the defendants furnished the abstract, and so they did interpret the contract, the parties interpreted the contract just as we feel it should be interpreted, and that is our second point we urge upon the Court.

And then, lastly, and before arguing this, I should point [75] out to the Court that our action here is

(Testimony of Glenn Woodbury.)

based upon the contract, it is based upon this contract right in Paragraph 4, to have the money returned to the Buyers, the title being unmerchantable. This is not an action for rescission, but we might argue here, your Honor, that even if this contract did not have the language of Paragraphs 1 and 4, even if we were to disregard that, and our situation were to be something else, that Paragraph 2 of the contract clearly says that the real property is to be conveyed by contract for deed, whatever that is in the way of a conveyance, and the personal property by bill of sale free and clear of all liens and encumbrances. I admit that the term "contract for deed" as a conveyance is somewhat new to me and doesn't make much sense, but regardless, the conveyance was to be free and clear of all liens and encumbrances. That part of Paragraph 2 is clear, it is in printing, and this being true, even if this contract did not have Paragraphs 1 and 4, and even if it weren't for the clear interpretation by the parties, placed by themselves on those paragraphs, which we think is in keeping with the language, then it is our view that the Montana cases on the contract requirement of a conveyance free and clear of encumbrances would require proof of the merchantability of their title prior to the time for payment, and I can cite to the Court the case of *Bozdech vs. Montana Ranches Company*, 67 Montana, 366, that held when a vendor is unable to convey the title stipulated for in [76] his contract at the time a conveyance is due, the vendee is not required to make any tender of the

(Testimony of Glenn Woodbury.)

balance of the purchase price as a prerequisite to his right to rescind. I am merely citing these to show the general rule in Montana. Our action is not for rescission, it is based on Paragraph 4. Again in *Silfvast v. Asplund*, 93 Montana, 584, the Montana Court said that a purchaser has the right to expect the removal of the defects before the time set, as the rule which allows a vendor to remove defects after the time for final performance does not apply when time is of the essence of the contract; and in this contract, the last clause, paragraph 7, states that time is of the essence of this agreement. Our third proposition is that if we didn't have Paragraphs 1 and 4, which in series, and by their very language require an abstract showing merchantable title to be furnished first, and even if the parties hadn't interpreted the contract in keeping with that, then, the Montana rule is clear.

So, in line with all those propositions, we feel there is no cause for bringing in parol evidence attempting to vary the terms of this contract. This action is brought upon the contract Paragraph 4, which gives the buyers, plaintiffs here, the right of recovery, and we don't think the terms of that should be varied merely because the parties that had the contract prepared, and they admit Hagarty is the sellers agent, now claim it is ambiguous. I think the Court may refer to the [77] language in the *Bozdech* case cited previously, 67 Montana, 366, where the contract was drawn by a real estate agent, and it was shown there was an encumbrance there

(Testimony of Glenn Woodbury.)

not mentioned in the sales agreement, and our Court there said, "The authorities are unanimous in supporting what is therein said concerning encumbrances affecting the title to lands"—pardon me, I have got the wrong part of that. Here is the language I was searching for—I may have to correct myself on the case. It is the case of Hollensteiner against Anderson, 78 Montana 122. It was in that case where the contract was prepared by a landowner and fails to describe certain encumbrances, and there was a reservation of minerals, and the Court's language there is that "If it was the tentative agreement of the parties that the purchase was of the land subject to the rights of the Anaconda Company, the vendor should have had his contract so drawn; having failed to do so, he was precluded by the provisions of Section 10517, R. C. M. 1921, from varying the terms of the written contract by parol evidence, a sad commentary on the practice of having important legal documents drawn by a layman.

This testimony, admitted over the objection of plaintiff, was therefore improperly admitted and cannot aid the findings made." We feel the Hollensteiner case is very much in point. The vendors here should not be able to say "This is ambiguous, and we want it reformed," when their agent prepared it, and that is the testimony now before the Court and admitted by [78] counsel, that he was the agent of the seller, and, therefore, the parol evidence rule should apply and this case should proceed upon the contract itself.

(Testimony of Glenn Woodbury.)

Mr. Erickson: I have cited the same cases in a little trial memorandum I have prepared, but it is not in as good condition as it ought to be. In the Bozedeck case, the Court held the vendor could have no title at all at the time of the making of the contract, and if he was prepared to come through with good title at the time title was to be conveyed, he has complied.

I think one of the things the Court is going to have to determine here, which can't be determined from the contract, is the question of when the title was going to pass. We believe we are entitled to show what the understanding was at the time as to when the abstract would be furnished, and when the title was to be available, and we think under all the rules we are entitled to show that. I found a case yesterday, which I have cited in my little trial memorandum, *Bridges and Company, Inc. vs. Bank of Fergus County*, 77 Montana, 524, and the Court said in that case, "The face of an instrument is not always conclusive of its purpose. The rule regards the circumstances of the parties and executes their real intention, and prevents either of the parties to the instrument from committing a fraud on the other by claiming it to be what it in fact is not." In other words, the real transaction may be proved, [79] and that is all we think we are trying to do here, and I don't believe it necessarily varies the terms of the instrument, but I think the instrument is so ambiguous, I think it has both latent ambiguity and extrinsic ambiguity. Finally, I would say we have spe-

(Testimony of Glenn Woodbury.)

cifically pleaded that by a course of conduct of the purchasers, they waived the right to object to the title offered; and as to the matter of the construction the parties placed on the contract itself, we will hope to introduce testimony on that point.

Court: Well, the ruling of the Court upon this could be crucial in the case right at this point. For the benefit of counsel, I may say I am inclined to the position taken by the plaintiffs. However, a ruling upon it might foreclose the defendant, and I would prefer, and I can more properly rule upon the matter after a more full consideration of the case and the evidence presented by the defendant, and I am, therefore, going to reserve ruling on the matter and permit the defendant to go ahead with his evidence, and incidentally give him an opportunity to educate me.

Mr. Rimel: May it be stipulated that all the evidence will be considered in the same——

Court: Yes, it will all be received in the light of your objection and the ruling upon it, and we will proceed along that line, and you may rest assured the Court will keep in mind your objection and make a ruling upon it when it proceeds [80] to make a determination of the facts in the case and the law.

Mr. Erickson: It occurs to me along the same line, your Honor, since the matters you have grasped as crucial, that the brief that I have prepared on the matter, while it has the principal authorities, it is not as complete a brief as would like to submit.

Court: I think as it goes along, and at the close

(Testimony of Glenn Woodbury.)

of the evidence, for example, you may feel you would rather make another and different and more definite statement with reference to your position, and I will be happy to receive that. One of the things I am concerned about is, for example, because one clause in the contract may be ambiguous, if that clause itself is not determinative in the settlement of this action, is that any reason for opening up the contract to parol testimony. For example, the contract for deed proposition, that is an ambiguous thing, but because that is ambiguous, does that mean you can proceed by parol testimony to explain what they were talking about when they were talking about furnishing an abstract of title. You see, I don't know that the provisions of the contract providing for the furnishing of an abstract of title are ambiguous, and if they are not ambiguous, then should any parol testimony be received upon the matter?

Mr. Boone: May I make a further comment, your Honor, with respect to the clause "contract for deed"? I think there is a reason for that language to be in there. I call the [81] Court's attention that the initial purchase price was \$36,000, the amount receipted for was \$5,000, leaving a balance of \$31,000, and it contemplated an \$11,000 payment. If the Court will take the exact amounts on the mortgage to Jannsen of \$16,200, plus the mortgage to the Federal Land Bank, the Court will note that there is a difference of approximately \$200 in there. In other words, in addition to assuming those two mortgages,

(Testimony of Glenn Woodbury.)

your Honor, the Clermonts, after making the \$11,000 payment, would still owe Woodbury a couple of hundred dollars, so that there is a basis for a contract for deed. In other words, Woodbury's interest wouldn't be cleared out entirely by the \$11,000 payment. He would still have something over \$200 coming.

Court: Yes, I think that may be the situation, and you may, as a result of explanation and parol evidence, explain and show what was actually meant by this and that it does mean a contract for deed actually, but because that is, as I say, because there is some ambiguity there, it doesn't open up the whole contract, does it, to parol evidence?

Mr. Rimel: That is the way we view it.

Mr. Erickson: My view would be somewhat different than that for this reason: The general rule is when it is obvious the instrument is not intended to be a full agreement, then the Court has a very great latitude in determining what the full agreement is, and it might have the effect of varying [82] terms more or less specific.

Court: Yes, I can see that too, I can see there is that possibility. Let's proceed in any event. Understand my position is that I don't want to make a crucial ruling on a point that would foreclose the defendant, or the plaintiff as far as that is concerned, and I think we will do better by proceeding with the testimony and letting the Court make a decision at a more leisurely pace.

Mr. Erickson: May I interject one more thought?

(Testimony of Glenn Woodbury.)

Counsel, in his memorandum to the Court on the Motion to Dismiss, says the language in Paragraph 2 is nonsensical because the obvious intent was that the Woodburys would be paid in full and would convey title. That is a pretty good indication it does require some study. Then, I would say one more thing on the matter of looking into language that is clear. I think that is also subject to the rule that it must be harmonized, even if that has the effect of making what appears to be specific express language say what it says or varying it some. I believe that is also an exception, that you can look into the whole contract where you have to harmonize all of it, to make it have meaning.

Court: Well, Court will stand in recess for 15 minutes.

(15-minute recess.)

(Glenn Woodbury on the Stand - Direct Examination by Mr. Erickson.)

Court: Very well, you may proceed with your questioning. [83]

Mr. Erickson: Would you read the last question?

(Question read back by Reporter as follows:

Q. And what was the conversation about?)

A. That was down in the field, as I recall it.

Q. What was it about?

A. Well, it was about the purchase of the place.

Q. And were Mr. and Mrs. Clermont present at all times when this conversation took place that you are about to relate?

A. They were there all of the time.

(Testimony of Glenn Woodbury.)

Q. Go ahead, tell us what that conversation was?

A. Well, there was a quite a conversation. It will take quite awhile to give it all, but they asked the price, what I wanted for the place.

Q. What did you tell them?

A. I told them \$38,000. They wanted to know the terms. I told them I didn't know the exact terms, but I wanted my equity out, and it would be approximately half of the purchase price, which was around \$18,000.

Q. Did you, at that time, discuss where the rest of the money was to go?

A. Yes.

Q. Tell the Court that discussion?

A. I told them I wanted my equity out, and I had a contract with a fellow by the name of Bernhard Jannsen, which was a good contract, three percent interest; and I wanted to take my [84] money out because I had other places to use the money, and then this contract with Mr. Jannsen.

Q. Was there any discussion with reference to the Federal Land Bank mortgage referred to in the pleadings?

A. Yes, it was mentioned too that there was a mortgage to the Federal Land Bank, and I had a contract with Bernhard Jannsen.

Q. Was there any discussion of the balance due on the Bernhard Jannsen contract?

A. Yes, I told them it was approximately \$16,000, as I recalled it.

Q. Was there any further discussion of the terms of the Jannsen contract at that time?

(Testimony of Glenn Woodbury.)

A. Yes, as to the way it was paid, the amount of payments and the rate of interest.

Q. What was said about that?

A. Well, it was \$1,000 a year and three percent interest, which we explained to Mr. Clermont was about as cheap a rate of interest as you could ever hear of and which made it a very good contract, and he agreed with it.

Q. At that time was there any discussion about the fact the land was irrigated? A. Yes.

Q. What was that discussion?

A. Mr. Clermont asked where I got the water.

Q. Did you tell him?

A. Yes, I told him it came from what was called the Big Ditch. He asked where that water came from. I said, "It comes from Lake Como," and he wanted to know where Lake Como was, and I told him it was up around Darby somewhere. I didn't even know myself; I don't yet, I never been there.

Q. Was there any discussion of the cost of water? A. Yes.

Q. What was that?

A. He asked what the water cost, and I said, "Well, it varies," I said, "but last year it was around \$4.00 an acre, or was \$4.00 an acre, or it might have been \$4.10, I don't know for sure. It has never been the same any year since I have been there." and Mr. Clermont said, "Is that all for maintenance, or is part of that for construction?" and I said, "Part of it is for construction," and he said, "Well, maybe some of that will get paid off

(Testimony of Glenn Woodbury.)

some day then," and I said, "Yes, I understand part of it goes to pay off, it is a Federal Government loan on the Ditch, the Government financed the ditch," and I said, "I understand a portion of that goes to them to pay for the construction, but," I said, "I don't know how much per year, but some of it goes for construction," and he said, "Well, it will eventually get paid out then, won't it?" I said, "Yes, is might not be in my or your time, I don't know, but," I said, "I guess eventually it will pay out."

Q. Any further discussion at that time of the irrigation or the water?

A. Well, at the same time, I told him, I said, "I don't know too much about it, but," I said, "If you want to know any more about it, the place to go is Hamilton, either to the Courthouse or the Irrigation District. They can tell you all about it. I don't know any more than I am telling you, but if you would like to know, find out when it pays out and how much there is against it, why go to Hamilton and inquire at either the Courthouse or the Irrigation District." I said, "I don't know which place can tell you, but the water comes right with the tax assessment and is paid with the taxes. So," I said, "I imagine the Courthouse could tell you."

Q. Now, what further conversation took place at that time out in the pea field?

A. Well, among other things, Mr. Clermont said that if he had to pay me \$18,000, it wouldn't leave him anything to go on, is the way he put it, to buy stock and machinery, and wanted me to take less

(Testimony of Glenn Woodbury.)

down payment and then carry, finance part of the place myself, and I told him no, rather than do that, I would rather take less money, because I wanted to assign my contract with Jannsen to him, take my money out, and be clear out of the picture.

Q. Now, what was his response to that?

A. Well, he wanted to know how much less I would take, and [87] I asked him how much—I said, “How much can you give and pay me out so that I will be out of it.” I remember remarking this to him, I said, “There is already a mortgage to the Federal Land Bank and a contract to Bernhard Jannsen, and” I said, “if we make a new contract between you and I, it would get pretty complicated, and,” I said, “therefore, I would like to just be out.” I also asked him what amount he could pay and still leave him something to go on, and he, before the conversation was ended—I don’t remember who brought it up, but anyway, the proposition was put to me to give him a share of the crop, landowner’s share of the crop, and make the money \$36,000.

Q. \$36,000 would be the total purchase price?

A. Yes, and that way that would leave him enough to go on. If I took \$2,000 off the purchase price, that would leave him something to buy stock and machinery.

Q. Was anything further said during the conversation in the pea field?

A. Well, I suppose there was.

Q. But I mean with relation to these negotiations that you now recall?

(Testimony of Glenn Woodbury.)

A. There was quite a few things talked about. He first wanted—at one time in the conversation, he asked me if I wouldn't lease the place to him for a year so that he would—now, wait a minute, I am possibly mistaken there. One proposition, [88] he wanted to work for me for a year. Now, I am not sure whether he brought up the lease proposition or not. He wanted me to hire him for a year so he would know what the place was like. I told him if he bought the property and I continued to farm it—he didn't want to farm it that year he said because it was too late to buy his machinery and stock, and he had a job, but he might come and irrigate it for me and live on the place, and I told him that I would hire him to work and irrigate it if he wanted to if he bought the property, but otherwise, I had what men I needed.

Q. Now, did you at that time make this contract which is attached to the complaint, and the one you are familiar with, of May 2nd?

A. Did we make it then?

Q. Yes.

A. Not right then; we made it the same day.

Q. After your conversation in the pea field, at that time you didn't come to any agreement, is that correct?

A. That's right. He had made me an offer, but I hadn't accepted.

Q. Then did the Clermonts and Mr. Hagarty leave?

A. Yes.

Q. Did they return later in the day?

(Testimony of Glenn Woodbury.)

A. Yes.

Q. How much later? [89]

A. Oh, approximately two hours.

Q. Did you then have a conversation with Mr. and Mrs. Clermont? A. Well, a little, yes.

Q. Whereabouts?

A. In front of my house where I live.

Q. Who was present at that conversation?

A. Them, Mr. Hagarty and myself.

Q. Did that conversation concern this deal which you were about to enter into? A. Yes.

Q. What was that conversation?

A. I came out of the house and met them as they drove up in the car, and Mr. Hagarty asked me if I had made up my mind to deal, to make the deal. I said, "I don't know, I haven't had too much time to think about it." Mr. Hagarty said, "Well, we have been talking it over, and we decided that if you accept this deal, inasmuch as Mr. Clermont is receiving a share of the crop, it would be no more than right that he pay a share of the water and taxes for the year," and my exact words to Mr. Hagarty were, "You had better start to thinking over again," and he asked why. I said, "Because if I sell the property to you under those terms, Mr. Clermont will have to pay all the water and taxes," and he asked me why, and I told him that according to my understanding of the deal, Mr. Clermont would be the owner of the ground and I would be the tenant leasing it from him. and I said, "I have leased ground from other parties before, and never had to pay

(Testimony of Glenn Woodbury.)

water and taxes for the land owner if I leased on a share crop." Mr. Hagarty turned to Mr. Clermont and he said, "Well, maybe that's right, what do you think about it, Mr. Clermont?" He said, "Well, I guess that's right," and Mr. Hagarty said, "Well, do you want it that way then?", and Mr. Clermont said, "Yes, I will pay the water and taxes," and Pat turned to me and said, "What about it, are you ready to deal?" I said, "I guess, come on, let's fix it up," and we went in the house.

Q. Who was present at the house when the deal was fixed up?

A. Well, Mr. Hagarty, Mr. and Mrs. Clermont and I were in the front room, and my wife, I think, was in the kitchen at the time.

Q. Now, at that time, and during the time you were fixing up the contract—who fixed up the contract, by the way?

A. Mr. Hagarty.

Q. Was there then any discussion of your contract with Bernhard Jannsen?

A. Yes, there was.

Q. What was that discussion?

A. When Mr. Hagarty went to write out this agreement of his, he asked what the amount to Bernhard Jannsen was, and what the amount to the Federal Land Bank was, and I told him that the Bernhard Jannsen contract was about \$16,000, I didn't remember, I thought it was an even \$16,000, but it since turned out to be \$16,200, but we used the general term "about", and I believe that is what Mr. Hagarty wrote in the contract, and I looked in my desk and got my last Federal Land Bank statement,

(Testimony of Glenn Woodbury.)

receipt for the payment, and we got the amount off of it, I believe, and Mr. Hagarty asked me if I had the Jannsen contract handy, and I told him, I said, "I have got it here, I don't know just exactly where it is here." I keep my drawer in kind of a haphazard fashion, and I didn't know exactly where to put my hand on it. I said, "If you want it, I will find it." Everybody seemed to be in more or less a hurry. I was busy in the field and wanted to get back to work, and they seemed to be more or less in a hurry, and Mr. Hagarty turned to Mr. Clermont and asked him if he would like to read this contract with Jannsen. He said, "No, that isn't necessary. When I pay the other \$11,000, why we can get that." I said, "Yes, I'll find that contract, and I will make an assignment of this contract to you," and he said that was okay anytime just so he got the contract by the time he made the \$11,000 payment. There was also some discussion there as to when the \$11,000 should be paid.

Q. What was the discussion?

A. I asked him when he wanted to pay it, and he said as soon as he got his money from Canada, and I asked him when that [92] would be, and he said it would be most any time, he could have it within a few days and suggested that we make the payment due the 15th of May, and I told him something might go wrong and he might not get it by the 15th of May. I said, "You had better make it the 15th of June." He said, "I am sure I will have it by the 15th of May," and I told him, "Well, if

(Testimony of Glenn Woodbury.)

you have it, you can pay it, it doesn't make any difference, pay it as soon as you want, but," I said, "you had better take another 30 days because I am in no hurry, and you never know, something might happen and you wouldn't have the money by the 15th of May," and I said, "the 15th of June is just as good as to me as the 15th of May," so Mr. Hagarty put it the 15th of June.

Q. Was there at that time any further discussion of either the water or the Jannsen contract?

A. Well, nothing more than what I have mentioned, not that I remember.

Q. I have reference to the conversation at the house.

A. Well, only that I told him I would assign the contract to him, I would have the contract available on the payment of the \$11,000, and make an assignment of my contract to him.

Q. And was it at that time that Mr. Clermont paid the \$5,000?

A. Yes.

Q. And of the \$5,000, what amount did you get?

A. \$4,000. [93]

Q. And the other \$1,000?

A. Mr. Hagarty. I might add, if there is no objection, it might have no bearing, but you was asking what conversation took place. Among other things, as Mr. Clermont wrote out the check, or handed the checks to us, he turned to Mr. Hagarty and asked him if he thought he would get that \$1,000 back he paid on the place over at Great Falls. That was the

(Testimony of Glenn Woodbury.)

first intimation I had that he had been in any other deal that he was trying to back out of.

Mr. Boone: Move to strike that, your Honor.

Court: It may be stricken.

Q. Now, when did you, or did you have further conversation with either Mr. or Mrs. Clermont?

A. Yes.

Q. I assume after this instrument, after it was signed, they left, is that correct?

A. Yes, they left within a few minutes.

Q. When did you next have a conversation with either Mr. or Mrs. Clermont?

A. Well, I don't know the exact date, but it was either the Sunday following this day, or the second Sunday following.

Q. It would be sometime, then, in May, the early part of May? A. Yes.

Q. With whom did you have this conversation?

A. Mrs. Clermont.

Q. Where did that conversation take place?

A. At Frenchtown.

Q. What was the occasion of your seeing her at Frenchtown?

Mr. Rimel: I may anticipate a little, but may we have the same objection? I gather it could go similarly to this. We are getting into a field of conversations following the actual execution of the contract, as I understand it.

Court: Yes.

Mr. Rimel: I would like to make an objection at this time on the parol evidence rule, and also on the

(Testimony of Glenn Woodbury.)

Montana statute that a written agreement cannot be altered except by a written contract of the parties or by an oral executed agreement.

Court: What is the purpose of this?

Mr. Erickson: We have pleaded waiver in our pleadings of the right to demand the title called for, and in addition we have the rule of the conduct of the parties. We have in mind, and we have pleaded fraud.

Court: Subject to the objection, proceed.

Mr. Rimel: We would like to have the same understanding that our objection goes to all of this testimony.

Court: All of it, yes. You may proceed.

Witness: Where were we?

Court: You had a conversation down at Frenchtown.

Witness: You asked why I went there? [95]

Q. (By Mr. Erickson): Yes.

A. I went down primarily to see if Mr. Clermont was going to move on the property and irrigate for me that summer.

Q. And you saw Mrs. Clermont, but not Mr. Clermont? A. Mr. Clermont wasn't there.

Q. Did you have any conversation with Mrs. Clermont relative to this deal you made?

A. Only that she made the remark they might have made a mistake buying it, but she told her husband that she thought if they decided they didn't want it, Mr. Hagarty could resell it for them.

Mr. Rimel: We move the answer be stricken be-

(Testimony of Glenn Woodbury.)

cause it is not in keeping with counsel's stated purpose to prove waiver.

Mr. Erickson: We have pleaded—I don't want to be in the position of having said something to the Court which isn't completely correct. We have pleaded that these plaintiffs, within a few days after making the contract, determined they were not going to carry through its terms, and the testimony now, and the testimony we hope to offer later, will show that negotiations opened almost as once on the part of the Clermonts to get their money back without anything being said about the title or anything else. We have some conversations along that line. That is the purpose of the testimony, in addition to the waiver.

Court: Very well, but does this testimony prove that? [96]

Mr. Erickson: I think so. We will offer to prove through this witness and others that Clermont, on several different occasions, prior to the time he called for the abstract, came to see Mr. Woodbury and asked to receive his money back without mentioning the title or anything else, saying he wanted to get out of the deal and made various offers to draw a new contract. It is material to show two things. One is waiver, and the other, to sustain the pleadings. There was no motion to strike. Issue was made on it that the purpose of these plaintiffs in calling for the abstract was to fraudulently relieve themselves of the obligation to perform under the contract.

(Testimony of Glenn Woodbury.)

Mr. Rimel: We object on that statement to the proposed testimony on the basis of relevancy, your Honor.

Court: I am concerned about it myself, but I will permit you to proceed with it. What you have already testified to doesn't prove anything, just if we decide we don't want it, we can make another deal. That is all that was said. I don't know, I don't think that proves anything except that is the position everybody is in, if they make a contract and don't like it, they can make another deal.

Mr. Erickson: I think it has relevancy for the additional reason that one of the things the Court has to determine—I don't agree with counsel that it is easy to determine from the contract what the parties contemplated when they talked about the time to which the abstract was to be continued, when the [97] deal was to be closed. It has some relevancy along that line.

Court: I will reserve ruling on the objection, and you may proceed. It is time for noon recess. Do you want to come back at 1:30 or 2:00?

Mr. Erickson: I am hopeful, your Honor, we might be able to complete the case today. I would as soon come back at 1:30.

Court: All right, do that. Court will stand in recess until 1:30.

(Noon recess.)

(Glenn Woodbury on the stand, Direct Examination by Mr. Erickson.)

Q. At the conclusion of this morning's session,

(Testimony of Glenn Woodbury.)

you had testified concerning a conversation you had with Mrs. Clermont at Frenchtown. Now, after that, did you have any further conversation with either Mr. or Mrs. Clermont? A. Yes, I did.

Q. And with whom was the next conversation?

A. Well, mostly with Mr. Clermont.

Q. Where did that conversation take place?

A. At the house at the ranch.

Q. And can you give us an approximate date on that?

A. Well, I think it was the Sunday following. It was a Sunday, I am quite sure, and I think——

Q. The Sunday following the making of the agreement?

A. No, following the conversation in Frenchtown, the visit [98] Mr. Hagerty and I paid them in Frenchtown.

Q. With relation to the month of May, was it in the month of May?

A. Yes, I am sure it was.

Q. Who was present at that conversation?

A. Well, during most of the conversation that had any bearing on the deal, Mr. Clermont and I were in the front room, and I believe his wife and mine were in the kitchen. They came out there in a rainstorm and had a little trouble. They had gotten in a neighbor's field and had gotten stuck and my boy and I went down and pulled them out. While they were coming, my wife fixed dinner for them. We had dinner, and after we ate, Mr. Clermont and

(Testimony of Glenn Woodbury.)

I went in the front room to discuss the deal. I believe our wives stayed in the kitchen.

Q. What was the discussion at that time?

Mr. Rimel: I hate to interrupt, but may our general objection go to all of this?

Court: Yes.

A. You say what was this discussion?

Q. Yes.

A. He informed me at that time that since he had made the deal, he was having a little trouble getting his grain sold in Canada, and the party that had bought his property there was unable to make the payment, so he thought it would help him considerably if I would take about \$5,000 of the \$11,000 and [99] put the other \$6,000 on a contract for him.

Q. Did anything result from that conversation? Did you make any change in the contract?

A. No, I told him I still felt as I had when we made the deal, that I was selling the property with the understanding I was to get my full equity out so I could have the opportunity of doing something else with it. I figured I could do more good than having it invested in that property. I also told him it would be a contract on top of the other contracts, and I told him that was the way we agreed and I felt that was the way it should be.

Q. At that time did Mr. Clermont ask anything about the title to your property? A. No.

Q. Any mention made about the abstract?

A. No.

(Testimony of Glenn Woodbury.)

Q. At any time was there any discussion had with Mr. Clermont about when the abstract was to be furnished? A. No.

Q. Did you have any further conversation with Mr. Clermont after the one you have reported?

A. Yes.

Q. When did that occur?

A. Well, I can't give a date, but I would say approximately another week, or maybe less. I don't remember that for sure. [100]

Q. Where did that conversation take place?

A. On the road leading from the main road up to my house.

Q. Did Mr. Clermont come down to see you?

A. Yes.

Q. Who was present at that time?

A. Just him and his wife.

Q. And yourself? A. Yes.

Q. What was the nature of that discussion in the road?

A. Mr. Clermont wanted to know at that time if I couldn't forget I had ever seen him and give him back his \$5,000.

Q. Was that the general language he used?

A. Well, pretty well.

Q. I mean he said something about "can't we just forget the whole thing"?

A. Yes, he thought maybe we could forget we had ever seen each other because at the time I made the deal I didn't seem to care whether I sold it or

(Testimony of Glenn Woodbury.)

not. He thought I would just give him back his money and forget we had ever met.

Q. Any discussion then about the abstract or title? A. No.

Q. You didn't agree with him, I take it?

A. No, I didn't.

Q. Did you discuss then anything about redrafting the contract or working out any deal or anything? [101]

A. I asked what the trouble was. He informed me again he wasn't able to get the money he had coming, and I told him I wasn't going to hold him to that specific date. He said that he couldn't afford to lose the money. I said, "I don't want you to lose your money; I don't want your money for nothing, I merely want to complete the deal. I sold the place to you in good faith and I thought you bought it in good faith. All I want is to complete the deal, but as far as the date of the 15th of June, I don't figure on holding you to it if you don't have the money at that time."

Q. Did you have other conversations along similar lines with Mr. Clermont along with that one?

A. Yes, he returned again.

Q. And was the subject of the conversation about the same as what you have reported as to the other two? A. Just about the same.

Q. No agreement was reached? A. No.

Q. After those conversations, when did you next hear from Mr. Clermont, if you did?

(Testimony of Glenn Woodbury.)

A. You mean after all of these conversations?

Q. Wes. A. Well——

Mr. Erickson: May I have that last question stricken, your Honor, there was a point I overlooked. [102]

Court: Yes.

Q. During these conversations with Clermont after May 2nd, was there any discussion of the Jannsen contract with him?

A. Not specifically, only in our talkings of whether I should write him a new contract or not, I made it clear, I thought, that I expected to have my equity out and assign the contract to him so I would have no more equity.

Q. Did you receive a letter from Mr. Clermont about sometime in the middle of June?

A. Yes, I received a registered letter from him.

Q. I believe that is a letter that has been admitted in evidence, dated June 11th, Plaintiffs' Exhibit 2. Do you recall having seen that letter?

A. Yes, I saw it.

Q. What date did you receive that letter?

A. June 15th.

Q. How do you fix the date as June 15th?

A. Well, because I considered that the payment was due on June 15th, and I thought that that was kind of a funny time to be asking for the abstract, the date the payment was due.

Q. I note from a copy of the 1953 calendar that the 11th, which is the date the exhibit bears, is a Thursday, and I think you have already testified it

(Testimony of Glenn Woodbury.)

came by registered mail. Do you recall what date you got the notice, what day of the week? [103]

A. It was the last—it depends on what day—I received the notice one day and I went to the post office the next mail day.

Q. You live out in the country? A. Yes.

Q. I note the 15th is Monday on the calendar. Would you say you had gotten the notice on the Saturday preceding, which would be the 13th?

A. Yes.

Q. And you actually received the letter, however, on June 15th, is that correct?

A. That's right.

Q. Now, upon receipt of that letter—or prior to the receipt of that letter, had anyone made any demand on you for the abstract?

A. As far as my memory serves me, the abstract had never been mentioned.

Q. That is the first notice you had that anybody wanted the abstract, is that right?

A. That's right.

Q. What did you do in response to that letter of June 15th?

A. I got in my car about as fast as I could and went to see a lawyer.

Q. Who did you go to see?

A. Claude Johnson.

Q. After that, what did you do, if anything, with relation [104] to that letter?

A. Contacted Mr. Geiman.

Q. Is he the abstracter?

(Testimony of Glenn Woodbury.)

A. He is the abstracter.

Q. Also an agent for the Federal Land Bank?

A. Yes.

Q. What did you do then, you contacted him?

A. I got him to give me the abstract to take to Mr. Boone.

Q. Did you do that? A. Yes.

Q. Did you have a conversation with Mr. Boone about that abstract? A. Yes, I did.

Q. Where did that take place?

A. In Mr. Boone's office.

Q. Who was present?

A. Mr. Boone and I.

Q. Tell us what that conversation was?

Mr. Rimel: Objected to, your Honor, the time and place not fixed.

Q. Was that on June 15th? A. Yes.

Q. About what time of day was it?

A. Oh, it was in the afternoon sometime.

Q. And it was in Mr. Boone's office? [105]

A. Yes.

Q. All right, tell us now what that conversation was?

A. After waiting quite awhile to get admitted to Mr. Boone's office, I went in with the abstract and informed Mr. Boone I was there with the abstract on the contract, the Jannsen abstract, and he said that was fine, and I said, "But there is another item that I think should be taken care of at this time before you receive the abstract." He wanted to know what that was, and I told him that there was a mat-

(Testimony of Glenn Woodbury.)

ter of about \$11,000 payment that was due that day, and he informed me they weren't going to pay me \$11,000 or any more money on that contract until they had a chance to examine the abstract. I agreed with him that that was quite all right with me, I didn't expect him to give me any money, but I asked him if he thought it was any more than right that he have the money in his possession when he examined the abstract inasmuch as the payment was due that day, so if the abstract was not right and I was out an expense to make the abstract right, that I had no assurance that the deal was going to be completed.

Mr. Rimel: If I may break in. We object to this line of testimony on the ground it seeks to interject an opinion. I admit it is Mr. Boone's opinion on something governed by the contract itself, and I think it is therefore irrelevant.

Mr. Erickson: May it please the Court, the testimony elicited by Mr. Boone had to do with a course of conduct, and [106] the comment was made by Mr. Rimel that we assumed that the abstract had to be brought in at a certain date because of conduct on our part. He seeks to bind us by conduct. I feel we have the right to show exactly what transpired when we produced the abstract.

Court: Very well, you may proceed. I will reserve ruling on the admissibility of it.

Q. Now, you have just testified in your conversation with Mr. Boone you said something to the effect that you wanted to be assured the money was

(Testimony of Glenn Woodbury.)

available so if there was a defect and you corrected it, the deal would go through. Was that in substance what you said? A. Yes.

Q. What further was said?

A. I just told him I didn't want the money myself, I wanted him to have the money and hold it and if the abstract was okay, deliver it to me, and if it wasn't, I would make the abstract good, whatever it took, and when I made it good, I wanted the money to be there as assurance. He told me he couldn't do that because the Clermonts weren't there. I said, "Where are they?", and he told me they were in Canada, and I said, "Isn't that kind of a funny place to be on the day the payment becomes due?" I said, "I don't generally do business that way myself," and he said, "Well, you can suit yourself, you can leave the abstract or not." I said, "I want to leave it, but I want the money, [107] and no money, no abstract."

Q. So what happened then?

A. I walked out with the abstract.

Q. Did you subsequently return to Mr. Boone's office? A. Yes.

Q. How long afterwards was that?

A. I believe that was on the 18th.

Q. And what, if anything, happened with relation to the abstract then?

A. I reported back to Mr. Johnson in Hamilton, and he——

Q. Was he your attorney?

A. He was my attorney at that time.

(Testimony of Glenn Woodbury.)

Q. Mr. Woodbury, don't testify as to your conversation with Mr. Johnson, because he is not a party to this action and it wouldn't be admissible, but you consulted with your attorney, and after that you——

A. I returned the abstract to Mr. Boone.

Q. Now, after that happened, you received these other various notices, did you not, the one dated July 22nd, and one dated July 27th, and I think you are familiar with both of them, two other letters? A. Yes.

Q. What, if anything, did you do about those letters?

A. I turned them over to Mr. Johnson.

Q. And from the time you got the first letter, you have been [108] represented by counsel in these proceedings, have you? A. Yes.

Q. And you yourself have not discussed the matter further with the Clermonts, is that true?

A. I never never saw the Clermonts until today.

Q. Have you yourself had any discussion with the law firm of Smith, Boone and Rimel?

A. Not since that time.

Q. Since that date? A. No.

Q. So that any negotiations or discussions would have been handled by your counsel, is that true?

A. That's right.

Q. In your cross complaint, Mr. Woodbury, you have asked that the Court order these plaintiffs to carry out the terms of this agreement and perform

(Testimony of Glenn Woodbury.)

the agreement to purchase the property, have you not? A. Yes, sir.

Q. Are you still in a position, the same position you were in, that is, you still have the property under contract from Jannsen? A. Yes.

Q. I think you have testified the contract is current, it is not in default?

A. No, not in default. [109]

Q. Have you continued to pay the taxes and other charges against the property?

A. I have.

Q. Have you made payments under the Federal Land Bank mortgage? A. Yes.

Q. Are you still willing to go ahead with the sale of the property to the Clermonts?

A. Yes.

Q. Are you willing to apply the \$5,000 on the purchase price of the property? A. Yes.

Q. Mr. Clermont, are you in a position to pay off the Jannsen contract for deed and secure a deed to the property from the Jannsens?

Mr. Boone: Objected to as immaterial.

Court: Overruled.

A. I would be if they were willing to go through with the contract, yes.

Q. Was there ever any discussion of such a course of action prior to the time the contract was made between you and the Clermonts?

A. No.

Q. Now, as to the lien of the irrigation district for the original construction charges, you have al-

(Testimony of Glenn Woodbury.)

ready testified that [110] there was a discussion of the amount of the water charge, is that true?

A. Yes.

Q. And under the terms of the agreement, and under the discussions, it is your understanding that Clermont agreed to pay the water charges, is that true? A. Yes.

Q. Now, would you be in a position to go ahead with an arrangement with the district under which the property could be removed from the lien?

A. Yes.

Q. You have testified, Mr. Woodbury, that you reduced the price of that property from 38 to 36 thousand dollars to make the deal with Mr. Clermont? A. That's right.

Q. Did you have any other opportunities to sell that property at about the same time to others than Clermont?

Mr. Rimel: To which we object for the reason it is irrelevant.

Mr. Erickson: The relevancy of that, your Honor, in my opinion, is this: We have alleged there would be a loss to Mr. Woodbury in the event this deal does not go through, that he has lost an amount greater than the amount of the down payment, and it would be my purpose with this witness and another witness to show he missed other opportunities to sell the land because [111] he sold it to Clermont. Since then the price would be substantially reduced and he would now be unable to get a price sufficient to absorb the \$5,000.

(Testimony of Glenn Woodbury.)

Court: Very well, you may proceed.

A. What is the question again, please?

(Question read back by Reporter.)

A. Well, after I sold it to Mr. Clermont, I withdrew it from the listing; I didn't try to sell it at that time.

Q. You had it listed with Mr. Hagarty?

A. Yes.

Q. Now, since that date, did you relist it for sale?

A. Yes.

Q. Have you been able to sell it?

A. No.

Q. Have you had any offers on it, price offers?

A. No.

Q. How long have you lived in that immediate vicinity?

A. Three years the first of this month.

Q. And prior to that time, you had bought and sold other land in the Bitterroot, is that true?

A. Yes.

Q. Do you know anything about the value of ranch property in the Bitterroot as of May 2, 1953, compared to its present value?

A. Well, I know it would be a lot harder to sell it at the same price now as it was then. [112]

Mr. Boone: Move the answer be stricken on the ground no proper foundation has been laid.

Court: I'll sustain the objection.

Mr. Erickson: I have another witness to qualify as an expert.

Court: May I interrupt, counsel? Let me get your position straight with reference to this, par-

(Testimony of Glenn Woodbury.)

ticularly the conversation you had the witness detail between himself and Mr. Boone, what was the purpose of that?

Mr. Erickson: Two purposes. One of them, we think that the contract is ambiguous as to the date the abstract was to be furnished. We will put on another witness who will testify as to the specific understanding when the abstract was to be furnished, but we think that language requires explanation that the abstract will be continued to a date subsequent thereto; and Mr. Rimel has suggested by reason of the fact we furnished the abstract on or about the 18th that we agreed with their view that we were, under the contract, obligated to furnish the abstract on the 15th.

Court: It seems to me that that is just about what you proved, isn't it?

Mr. Erickson: No.

Court: You have the witness testify he went in and saw them and made demand for some money before he would deliver the abstract. Mr. Boone said, "No, we are not going to give [113] any money," so he left and went and saw his attorney, then came right back with the abstract.

Mr. Erickson: I think the proof isn't quite as open and shut as counsel has suggested. I think Mr. Woodbury's conduct indicated that he felt the payment of money was considered concurrent with the furnishing of the abstract, and you would have some question then as to when the abstract was to

(Testimony of Glenn Woodbury.)

be furnished and when the money was to be furnished.

Court: Well——

Mr. Erickson: I have considered it counsel's duty to tell the Court all the facts. That is what I am trying to do in the matter, and I think the evidence is——

Witness: Do I have the right to explain why I felt that way?

Mr. Erickson: No, I don't want your opinion, we want to know what you did and what you said. If there is something you left out on what you did or what you said, we want that with relation to your conversation with Mr. Boone.

A. Well, as I recall what I told him was that I didn't think they could require me to fulfill my part of the contract if they weren't ready to fulfill their part was the way I looked at the situation.

Q. And you testified that was the first you ever had any notice on the abstract was that letter which you received on the 15th? [114]

A. No one had ever mentioned abstract to me up until that day I got the registered letter.

Court: I call that to your attention so you can argue it. I don't follow it. It seems to me what it proves that whatever idea the plaintiff may have personally had, which would not control in this matter—he may have some idea entirely foreign to the language of the contract—but that he came in and made his demand, then he went to his attorney and then came back and supplied the abstract, so

(Testimony of Glenn Woodbury.)

it seems to me it proves almost the opposite of what you are intending it to prove. That is what I am concerned with. You will have to explain that to me so I can understand your position, because I don't know as it now appears.

Q. Mr. Woodbury, why did you bring the abstract in to Mr. Boone?

A. Well, because Mr. Johnson——

Mr. Boone: Just a minute, it is calling for a conclusion of the witness.

Mr. Erickson: I don't believe it is a conclusion, your Honor, in view of the fact——

Court: He has already testified that he went to his attorney—and obviously we can't receive the testimony of the conversation between him and his attorney, but that following that, he then returns with the abstract. Those are the facts to which we are limited. [115]

Mr. Erickson: I wonder if I might have a couple of minutes recess? That is all the testimony from Mr. Woodbury on our case in chief.

Mr. Rimel: I wonder if counsel could come in and talk to you before you return to the bench.

Court: Fine. Court will stand in recess until five minutes after two.

(10-minute recess.)

Court: You may proceed.

Q. Mr. Woodbury, did you in fact ever have a mortgage in which Bernhard Jannsen and his wife were parties with you? A. No.

Q. Was there ever any other instrument than

(Testimony of Glenn Woodbury.)

the contract for deed? A. No.

Q. Did you in any conversation with Clermont ever refer to the contract for deed as a mortgage, as you recall? A. No.

Q. Would you say you didn't ever refer to it as a mortgage?

A. I am quite certain I didn't.

Q. And your testimony earlier was that you discussed with Clermont several times the contract for deed you had with Clermont, is that true?

A. With Jannsen.

Q. With Jannsen. [116] A. Yes.

Q. Counsel pointed out, as you heard in the courtroom, that there was some difference between the total amount of \$36,000 to be paid and the total amount of the combination of the money owed to Jannsen and the Federal Land Bank and to you. Did you hear those comments of counsel?

A. Yes.

Q. Do you have any explanation of why the discrepancy between those items?

A. I think I mentioned once before, maybe I didn't, but as I recall, the contract Mr. Hagarty drew, it says about so much to Jannsen, doesn't it?

Q. I call your attention to the contract, which I believe is exhibit—it is attached——

A. Yes, it says "about \$16,500," and actually it was \$16,200, I believe. As I mentioned before, we didn't get a copy of the contract to look at it. Consequently, we didn't know exactly what the figures were at the time we drew that. We were

(Testimony of Glenn Woodbury.)

drawing that as a temporary agreement to hold us until the full deal—it was going to be until he got his \$11,000, and we were going to fix the whole deal up. Therefore, we were a little vague in the figures we were putting in. We were not specific, or we wouldn't have used "about" so much.

Q. You have testified in all of your conversations with Clermont, the idea was you were to get out of the picture entirely, [117] is that correct?

A. Correct.

Q. The \$16,000 would take you out of the picture?

A. That's right.

Mr. Erickson: That's all.

Cross Examination

Q. (By Mr. Boone): Mr. Woodbury, with respect to the Plaintiffs' Exhibit 2, as I understand it, this letter was sent to you by registered mail, and you were first notified by the post office that the letter was waiting for you?

A. That's right.

Q. Then, on Monday morning, June 15th, you went to the post office and got this letter?

A. That's right.

Q. And after receiving the letter and reading it, you immediately took off from Stevensville and went to Hamilton?

A. Correct.

Q. And went to consult an attorney?

A. That's right.

Q. And the attorney was Mr. Claude Johnson?

A. Yes.

(Testimony of Glenn Woodbury.)

Mr. Erickson: May it please the Court, I believe the witness is confused as to what he did on the 15th. I thought [118] that was a later date, Mr. Boone.

Witness: No, this was the 15th.

Q. So, on Monday morning, the 15th, after receiving the letter and after reading it, the first thing you did was go to Hamilton and talk to an attorney? A. Naturally.

Q. You took this letter to the attorney and showed it to him? A. Yes.

Q. After talking with your attorney you then went to see Mr. Geiman to get the abstract which had been demanded in this letter?

A. I believe Mr. Johnson called him on the telephone and asked him to get it ready.

Q. So, your attorney asked the abstracter to get the abstract ready which was demanded by this letter? A. That's right.

Q. After the abstract was prepared by Mr. Geiman, you then brought that abstract to my office?

A. Yes.

Q. But refused to leave it with me because I didn't have the \$11,000 in my possession?

A. That is correct.

Q. Then, as I understand it, you left my office on the 15th, and did you then return home?

A. I did. [119]

Q. When did you next go back to see your attorney? A. On the 18th.

(Testimony of Glenn Woodbury.)

Q. And which attorney did you go to on this occasion? A. Mr. Johnson.

Q. Would it change your testimony any if I were to suggest to you you went to see Mr. Koch in Hamilton on that date, would that change it?

A. I went to see him on one date. I don't remember if it was on that date or not, it could have been.

Q. Do you now recall you did see Mr. Koch about this matter of whether you should leave the abstract with me? A. Yes.

Q. So, it was Mr. Koch you consulted the second time with respect to this abstract, not Mr. Johnson? A. No, both of them.

Q. You went first to see Mr. Johnson, did you?
A. I believe, yes.

Q. After seeing him, then you went to see Mr. Koch, did you? A. I think so.

Q. You went to see both of them for advice on the question of whether you should leave that abstract with me for examination?

A. I believe so.

Q. After talking with both of them, then you returned to my office with the abstract of title and left it with me for [120] examination?

A. Yes.

Q. On the 18th when you left it with me, you did not on that day demand that I have the \$11,000, did you?

A. I didn't suppose it would do any good.

Q. But you didn't.

(Testimony of Glenn Woodbury.)

A. No, I didn't demand it.

Q. You didn't demand it on that occasion, and you left the abstract with me on the 18th for examination? A. Yes.

Q. Now, may I borrow your calendar for a moment, please? Will you refer to the 1953 calendar here and tell us what day of the week was the 18th of June?

A. It was May, I believe—no, it was June. I think it was Thursday.

Q. So that on Thursday afternoon, June 18th, you left the abstract with me, correct?

A. Yes, I suppose that is, according to your records of the date.

Q. That is according to your testimony, Mr. Woodbury, isn't it? I am going by your dates on what you have testified.

A. I don't remember the date I took it into you, only by the claim you make. I suppose you are right.

Q. You accept my date as the 18th?

A. Yes. [121]

Q. Now, showing you Exhibit "B," a copy of the letter which was written to you on June 22nd, signed by the Clermonts, I will ask you when did you receive that letter?

A. Well, I can't answer that one.

Q. Well, was it within a day or two after that letter was written?

A. Well, I suppose about three days, that is about what time it takes to get a letter.

(Testimony of Glenn Woodbury.)

Q. Now, with respect to the abstract, at the time of leaving that abstract with me on June 18th, do you recall that you asked me after I had examined it to return the abstract to Mr. Geiman at Hamilton?

A. Yes.

Q. After I examined the abstract and this letter of June 22nd was written to you, you knew I had returned the abstract to Mr. Geiman?

A. Yes.

Q. And it was returned on June 22nd, or within a day or two of that date?

A. If you say so, I guess, I don't know.

Q. You later determined from Mr. Geiman that it had been returned to him?

A. Yes.

Q. And you and your attorneys have had access to that abstract ever since June 22nd, 1954, or thereabouts? [122]

Mr. Erickson: To which I object on the grounds I can't see the materiality.

Mr. Boone: The materiality is that the statement of defects has been furnished, your Honor, in accordance with the contract.

Court: The opportunity to correct.

Mr. Boone: To correct.

Court: Very well.

Q. So that abstract was available to you and to your counsel after I had returned it following my examination on June 22, 1953?

Mr. Erickson: I will agree to that.

Q. Now, then, after receiving this letter of June 22, 1953, did you take the letter to an attorney?

(Testimony of Glenn Woodbury.)

A. Yes, I took them all to an attorney.

Q. Did you take it promptly to an attorney?

A. I did.

Q. Who was the attorney you took it to?

A. Mr. Johnson.

Q. I see. Did you, at that time, acknowledge receipt of the letter of June 22nd to the Clermonts or to me?

A. Well, I couldn't answer that, I don't know, did I or didn't I?

Q. Did you or didn't you?

A. I don't know, did I? [123]

Q. I am asking you, sir.

A. My attorneys acknowledged all the letters I knew anything about.

Q. And do you have any copy of any communication from any attorney to me or to the Clermonts with respect to this opinion or statement of defects of June 22nd?

A. The only correspondence that I know anything about is I mailed a letter to you fixed by my attorneys and I signed it telling you I received your letter, your complaint, and was turning the matter over to my attorneys and you would hear from them.

Q. Are you referring in that connection, Mr. Woodbury, to the letter of July 30, 1953, attached as Exhibit "D" to the complaint, is that the letter that was written?

A. That's right, I guess.

Q. Now, isn't it a fact that there was no letter,

(Testimony of Glenn Woodbury.)

either from you, or from your attorneys, to the two letters dated June 22 of 1953 and to the letter of July 27, 1953, until your letter of July 30th?

A. Yes, that's right, that was three days after the one you wrote on July 27th.

Q. Yes, three days after the letter of July 27th.

A. That was probably the day I received it.

Q. And well after, a month after the statement of defects was furnished to you on June 22nd?

A. Yes.

Mr. Erickson: May I object, the letters speak for themselves.

Court: Yes, they do.

Q. When you received that letter of July 27th from Mr. and Mrs. Clermont, did you take that to your attorneys? A. I did.

Q. Was that also to Mr. Johnson, Mr. Claude Johnson?

A. I think I took it to him first, as I recall it.

Q. Then, was there any communication from you or from your attorney, either to the Clermonts, or to me, at any time after July 30th with respect to this matter before this action was commenced in October, October 7th?

A. Not to my knowledge.

Q. In other words, there was not one single thing either you or your attorneys did about communicating with the Clermonts or with me with respect to this title, with the exception of that letter on July 30th? A. No, I guess not.

Q. Now, you mentioned in your direct exami-

(Testimony of Glenn Woodbury.)

nation here that you relisted this property for sale. When did you do that, and with whom did you list the property? A. Mr. Hagarty.

Q. When did you list it, sir, that is, relist it after this transaction with the Clermonts? [125]

A. Oh, I don't remember exactly.

Q. Can you give us some idea, some approximate time, please, as to when you relisted this property for sale?

A. Well, as nearly as I can remember, it was, oh, I would say along in July after I decided that they would rather have their money back and didn't want the property.

Q. So, that sometime in July, 1953, after the statement of defects had been furnished you, you relisted the property for sale with Mr. Hagarty, is that correct? A. Yes.

Q. And by relisting it, if an opportunity had presented itself to sell it in July, 1953, you would have then sold the property, would you not?

A. Well, to tell the truth, I hadn't decided. I had talked to my attorneys about it. They said, "If you get a chance to sell it, check with us and see what has developed by then."

Q. In relisting the property, what did you tell Mr. Hagarty you would take for it in July, 1953?

A. \$36,000.

Q. In other words, you told him, "If you have an opportunity to sell this property in July, 1953, for \$36,000, go ahead and sell it"?

Mr. Erickson: To which we object as argumenta-

(Testimony of Glenn Woodbury.)

tive, no foundation to support it as cross examination.

Court: Overruled. [126]

A. What was your question again?

Q. I said you in effect told Hagarty when you listed it for \$36,000, "If you can sell this property for \$36,000, go ahead"?

A. I told Mr. Hagarty the same as I have just told you, if he got a chance to sell it, I would check with my attorneys. If they said to sell it, okay, if they said not to, we wouldn't.

Q. Your attorneys previously told you if you had an opportunity to sell it, to sell it?

A. No, they didn't.

Q. But you did list the property with him?

A. Yes, under those conditions.

Q. When was it you first listed this property with Hagarty?

A. I can't answer that, I don't know the date.

Q. When was it with respect to June, 1953?

A. It was prior to that.

Q. How long prior?

A. I don't remember.

Q. Had it been listed for some period of time?

A. Some, I guess.

Q. Had you had any persons interested in it?

A. Well, there had been a few people look at it, yes.

Q. Had you had any people who went to the extent of making any payment on the property?

A. No.

(Testimony of Glenn Woodbury.)

Q. Now, at the time this Clermont transaction took place, Mr. [127] Hagarty was acting as your real estate agent? A. Right.

Q. You had employed him to sell the property and had agreed to pay him five percent commission to do so? A. Yes.

Q. And in all of the Clermont transaction, Mr. Hagarty was acting in that capacity, as your real estate agent? A. Yes.

Q. Now, in your testimony this morning, you were relating conversations which had taken place with the Clermonts on May 2, 1953, is that correct?

A. That is correct.

Q. Had you seen the Clermonts prior to that time? A. No.

Q. Do you know whether or not they had been to your ranch prior to May 2, 1953?

A. I know they said they had.

Q. When they came to the ranch on that day, who were they with?

A. Well, they were with Mr. Hagarty. I believe they were in their car and he was in his, as I recall it.

Q. So that there were the two Clermonts present and Mr. Hagarty and yourself? A. Yes.

Q. And was your wife present at that time?

A. No.

Q. Now, where did you first see them on that day?

A. As I stated this morning, it was down in the corner of a field I was planting to peas.

(Testimony of Glenn Woodbury.)

Q. Isn't it a fact that after they met you there, the discussions that were had concerning this property actually took place up at your house?

A. No.

Q. You mentioned that one other man was present?

A. That's right.

Q. He was a man who was working for you at the time and was driving a tractor, wasn't he?

A. That's right.

Q. Isn't it a fact you purposely directed the conversation so that all of you left where he was and didn't talk about the negotiations at all until you went to your house?

A. No, that is not a fact.

Q. I see. It is not a fact?

A. No.

Q. At that time in the conversations you say that you told Mr. Clermont certain things about your property?

A. That's right.

Q. I take it Mr. Hagarty was present during all that conversation?

A. Yes. [129]

Q. He was an interested party in the matter, wasn't he?

A. Yes, you bet.

Q. So, at all the times and during all the conversations on May 2nd that you related this morning, Mr. Hagarty was personally present?

A. Yes, he was there.

Q. Now, then, as I understand it, the first thing, or one of the first things you told Mr. Clermont was that you had the place under a contract with Jannsen?

A. That's right.

(Testimony of Glenn Woodbury.)

Q. That was said in Mr. Hagarty's presence, wasn't it? A. Yes.

Q. You also told him, according to my notes here, that the Clermonts would have to assume that contract which you had with Jannsen?

A. That's right.

Q. That also was in Hagarty's presence, wasn't it? A. Yes.

Q. Also, you told him, according to your testimony this morning, you owed Jannsen approximately \$16,000 on that contract of sale?

A. That's right.

Q. And that too was in Hagarty's presence, wasn't it? A. Yes.

Q. Now, then, there was other conversations before the contract [130] was signed about the Jannsen contract? A. That's right.

Q. Several statements by you, is that true?

A. Well, there was some, anyway, I don't know what you call several.

Q. Well, you said after they had left, a couple hours later they came back, and again you had told them.

A. That is when they came back to complete the deal.

Q. That you had told them about the Jannsen contract again? A. Yes.

Q. That again was in Hagarty's presence, wasn't it? A. Yes.

Q. So that all the conversations that concerned the Jannsen contract were in Hagarty's presence?

(Testimony of Glenn Woodbury.)

A. Yes.

Q. And after all the conversations and negotiations, the contract was prepared, was it not?

A. Yes, yes.

Q. It is true, isn't it, Mr. Woodbury, that all of the writing on the contract that appears in the blanks was put in there by Mr. Hagarty, with the exception of the signatures? A. Yes.

Q. And, of course, in preparing that contract, he was acting as your real estate agent?

Mr. Erickson: I am going to object to that, the facts [131] speak for themselves here, your Honor.

Court: Yes, it has been admitted that that is a fact.

Q. Now, I am handing you an executed copy of that agreement which has been attached to the complaint and admitted in the answer. I will ask you to examine it and tell us if your previous statement is correct that all of the writing on that contract is Mr. Hagarty's with the exception of the signatures by the Clermonts and with respect to the signatures of the Woodburys?

A. Well, as far as I know it.

Mr. Boone. We now offer in evidence Plaintiffs' Exhibit 3.

Mr. Erickson: No objection.

Court: It is admitted.

(Plaintiffs' Exhibit 3, being carbon copy of Receipt and Agreement to Sell and Purchase, was here received in evidence, and will be cer-

(Testimony of Glenn Woodbury.)

tified to the Court of Appeals by the Clerk of this Court.)

[See Page 260.]

Q. That contract was written out in your presence, Mr. Woodbury?

A. I was in the room, yes.

Q. Also in the presence of Mr. and Mrs. Clermont? A. That's right.

Q. And were you the first one to sign it?

A. I don't remember that.

Q. You don't have any recollection which one signed first? [132] A. No, I don't.

Q. At any rate, did you read it before you signed it? A. I don't know that I did.

Q. Your memory seems to be good about other circumstances that took place at the time this transaction took place. Is your memory not good as to whether or not you read that agreement?

A. No, it is not good as to whether I read it or not. I guess we all have lapses of memory once in awhile.

Q. Now, you saw in here that the language used, "Payable in full to Mr. Woodbury, less about \$20,000 mortgage to Bernhard Jannsen," you see that language in there?

A. That is the reason I doubt if I read it, but I wouldn't swear I didn't read it. If I did, I overlooked that. I knew, Mr. Hagarty, we all knew it was a contract instead of mortgage because Mr. Hagarty sold the property, was right in the law-

(Testimony of Glenn Woodbury.)

yer's office when he drew it up as a contract instead of a mortgage, so I doubt I even read it. I might have read it and overlooked it. I wouldn't swear one way or the other.

Q. So, if you read the contract, you would see it was worded that there was a mortgage to Jannsen?

A. Well, I didn't notice it.

Q. Or you didn't read it at all.

A. One or the other, I wouldn't swear which.

Q. Now, then, you told the Court this morning that at the [133] time this contract was prepared, at first you didn't have the exact figure of the balance owing to the Federal Land Bank under that mortgage?

A. At what time did you say?

Q. When the contract was first prepared?

A. We had it when it was prepared, I think. When we first were discussing it in the field, we didn't have the exact figures. I can't keep figures too good in my head.

Q. Do I understand that before Mr. Hagarty started writing this contract you knew definitely how much the balance was to the Federal Land Bank?

A. Well, as I recall, I looked up my last statement from them and got it off of that.

Q. So, there was no occasion to put a balance of "about" so many dollars in the contract insofar as the mortgage to the Federal Land Bank was concerned?

A. Well, I might be mistaken, we might have looked it up after. I don't know as I recall we

(Testimony of Glenn Woodbury.)

looked up the statement, I don't know, we might not have.

Q. Didn't you, as a matter of fact, before the contract was signed, look up in your records to see how much you owed Jannsen?

A. No, I didn't.

Q. I call your attention to the part of the contract, Mr. Woodbury, where under the title section, that the title will be [134] clear except certain encumbrances, first mortgage to B. Jannsen, \$16,200. Up above you give it as about \$16,500. Now, would that refresh your recollection that you did look it up?

A. It is very possible since you bring it to my attention that what we did was figure back to what I owed on the place when I bought it, subtract the amount of the Federal Land Bank loan from the total amount, and arrived at this figure. I am very positive we didn't look up the contract.

Q. Give that to me again, will you, please, I got lost in it.

A. We took the total indebtedness that I had on the place, subtracted the amount I owed the Federal Land Bank, and arrived at, maybe, \$16,200.

Q. Where did you determine the total indebtedness? Where did you have that?

A. I might possibly have had that in my head what I owed on it when I bought it.

Q. Then, I take it what you did was to say, "The total indebtedness on this place is \$19,763.98," is that what you did?

(Testimony of Glenn Woodbury.)

A. No, it was—let me see—we got the odd cents, I can assure you, from the Federal Land Bank loan, which was never even. As to just exactly how we come to that other conclusion, I don't know, because I hadn't owned the place very long at that time, and Mr. Hagarty and I might have figured out what he wrote on that contract after he wrote this. I believe there [135] was a little figuring done there and we decided it was \$16,200, subtracting the amount of the down payment.

Q. After that was determined, then this clause was put in, "Mortgage to B. Jannsen, \$16,200," is that right?

A. I guess.

Q. So, actually the mortgage to Jannsen appears twice in this contract, doesn't it?

A. It is written twice, I guess.

Q. Yes. Now, didn't you testify this morning that in your agreement with the Clermonts, they were to pay all of the 1953 taxes, except the water, including the water?

A. All the water, I don't remember about the taxes.

Q. You testified this morning they were to pay all of the 1953 taxes?

A. That is the way it run in my mind.

Q. You could be in error in that respect, Mr. Woodbury?

Mr. Erickson: I didn't hear the last question. May I have that?

Q. I said he could be in error in that respect.

A. I believe the way it was since you bring it

(Testimony of Glenn Woodbury.)

up, I told Mr. Hagarty they would have to pay all the water, but I would prorate the taxes with them. I am not positive about that.

Q. I call your attention to Paragraph 3 of the contract which says, "Seller shall pay all taxes and assessments for 12/12ths of 1953." Now, does that refresh your recollection [136] that that was what you agreed to?

A. No, that wasn't what I agreed to. That was what I agreed to down here, "Purchaser is to pay taxes and water." I guess it was all taxes and all water.

Q. So that provision here, you think, refers to all taxes and all water?

A. That is what it says, isn't it?

Q. It says "taxes," then brackets water, referring to water taxes. A. Water, right.

Q. Under this provision, you were to pay 12/12ths of the taxes for the year 1953?

A. I suppose that was the way it was figured out.

Q. Would you say now that is a correct recollection of what transpired at that time with respect to taxes?

A. The statement I made in regard to it this morning is still a correct statement of the facts.

Q. So that the conversations you related this morning with respect to taxes also were in Mr. Hagarty's presence? A. Yes.

Q. Now, as a matter of fact, Mr. Woodbury, didn't you and Mr. Hagarty, in the negotiations

(Testimony of Glenn Woodbury.)

with these people, characterize your relation with Jannsen as being that of a mortgage?

A. No, never.

Q. I see. Now, after this contract had been signed, and [137] before you had any further conversations with the Clermonts, did you have a copy of it? A. Yes.

Q. In other words, you got one copy of it and the Clermonts got a copy of it? A. Yes.

Q. And Mr. Hagarty kept a copy of it. Did you have occasion to read that contract?

A. Not that I recall.

Q. Would you say you did or did not read it?

A. I wouldn't say whether I did or not.

Q. And after you received that letter of June 11, 1953, did you read the contract then?

A. I did.

Q. And did you notice then that the matter with Jannsen was listed as a mortgage and not as a contract? A. Yes, I did.

Q. You understand there is a great deal of difference between a mortgage and a contract, Mr. Woodbury?

A. Yes, I know there is a difference.

Q. And did you, on rereading this contract, then did you write the Clermonts and say that a mistake has been made as to this situation with Jannsen, that that was listed as a mortgage and it should be a contract? A. No, I didn't. [138]

Q. Now, then, you testified this morning you had a further conversation after the deal was closed

(Testimony of Glenn Woodbury.)

with the Clermonts in your house, also on the road a little bit later when they were telling you they were having difficulty in getting their money out of Canada? A. That's right.

Q. Now, at the time of these negotiations, you understood that the Clermonts had come to Montana with 18 to 20 thousand dollars, somewhere in there?

A. I didn't know how much money they had.

Q. They told you if they were to pay \$18,000 down payment, they wouldn't have money to operate on? A. That's right.

Q. They proposed the payment be \$16,000?

A. That's right.

Q. And that would give them \$2,000 to operate on?

A. I didn't know how much it would give them. It would give them \$2,000 more than if they gave me \$18,000, I knew that.

Q. So that part you knew at that time?

A. Yes.

Q. You also knew at the time of these negotiations for the \$11,000 payment they were dependent upon the returns from the sale of wheat in Canada?

A. I didn't know it when they wrote the contract, I didn't know that. They said they had some money coming out of Canada [139] but I don't know as I knew exactly what it was for.

Q. You testified this morning, sir, that at the time that contract was prepared, you yourself had suggested that the date be June 15th.

(Testimony of Glenn Woodbury.)

A. Because they didn't know when they would get the money out of Canada, but it would be in a few days.

Q. From the sale of wheat?

Mr. Erickson: First I must object on the grounds his tone is argumentative and the question is argumentative, and he didn't testify to that conversation.

Court: I don't remember that testimony. Your objection is good, it is argumentative. If you want, challenge the record.

Mr. Rimel: I don't think it is relevant.

Court: Proceed.

Q. After the contract was made, they told you they had trouble getting the money from the sale of wheat? A. Or some kind of grain.

Q. They were asking for the time of payment to be changed so they could be sure and have the money available? A. That's right.

Q. You refused to do that?

A. No, I didn't refuse to change the time of payment; I refused to put it on a contract for them. I told them I would give them more time, but I didn't want to write a contract and [140] carry it. I wanted it by fall. I told them I would give them until fall if they needed it.

Q. There was one question asked you this morning at the start of your examination; there was one question asked you this morning, which I am going to repeat to you and repeat your answer, and I have taken this from the Court Reporter's records.

(Testimony of Glenn Woodbury.)

The question was this: "Did you have a legal title to that property?", and you answered, "I thought I did." What did you mean by that answer, Mr. Woodbury, referring to this property?

A. I mean I thought I did, just what I said.

Q. You thought you held legal title to it at the time of your negotiations with the Clermonts?

A. I thought I had merchantable title to it.

Q. And as this says, a legal title?

A. I thought I had a good enough title to sell it, or I wouldn't have been selling it.

Q. Now, with respect to the water. I want to go back to the conversation during the negotiations as to the water. Now, you, as I recall it, testified Mr. Clermont asked you how much was against the property, what were the charges for maintenance, is that correct?

A. Well, the way I remember putting it this morning, and the way I remember it, in the field he asked what the water cost per year, and I told him, and he asked if all of that was for [141] maintenance or if part was for construction. I told him part was for construction, I understood, but I didn't know how much of it.

Q. During your negotiations was there any statements made by Clermont as to his experience with irrigation districts?

A. Not that I recall.

Q. Do you recall any statements by him that he had ever owned a farm that was under an irrigation district?

A. No, I don't recall any.

(Testimony of Glenn Woodbury.)

Q. This agreement here provides that the purchaser is to get half of the hay, one-third of the grain, and I think it is one-third, or one-half, one-third of the peas. That was the 1953 crop, Mr. Woodbury?

A. That's right.

Q. At the time of the negotiations, the hay was in, wasn't it?

A. Yes.

Q. And you were in the act of planting the peas?

A. Yes.

Q. The grain was also in, wasn't it?

A. Yes.

Q. And Mr. Clermont was not to get possession of the property until he had made the \$11,000 payment to you?

A. Mr. Clermont could have moved in that afternoon, if he wanted to. [142]

Q. My question was, your understanding with him was he was not entitled to possession until he made the \$11,000 payment?

A. I still say Mr. Clermont could have possession any day he wanted it. The house was vacant, the yards were vacant; nothing stopped him from moving in. He even discussed moving in and putting a garden there.

Q. You actually kept possession of the property from May 2nd of 1953?

A. I did.

Q. You harvested the crop, had it harvested?

A. I did.

Q. Did you keep all the crop yourself, sir?

A. I did.

Q. All of the hay?

A. Yes.

(Testimony of Glenn Woodbury.)

Q. All of the peas? A. Yes.

Q. And all of the grain? A. Yes.

Q. There has never at any time been any statement or accounting to the Clermonts or to their attorneys with respect to the crop which was raised in the 1953 season?

A. I have never received any request for it yet.

Q. Have you ever made an accounting to them?

A. No. [143]

Mr. Boone: That's all, sir.

Redirect Examination

Q. (By Mr. Erickson): Mr. Woodbury, when did you discuss that, please, about putting in the garden, was it prior to June 15th? A. Yes.

Q. How long prior?

A. A couple of weeks, I guess.

Q. In the discussion about possession, did Mr. Clermont or Mrs. Clermont express any reason why they weren't going to take immediate possession?

A. Well, they were working for this fellow down there at Frenchtown. The reason they didn't want to farm it themselves, they said it was too late for them to get started, get machinery, stock and everything. It was their desire to take possession in the fall, that is, actual farming possession. I told them I would rather have sold it outright so I wouldn't have to farm it again that year because I had more irrigating than I could do. That is when we discussed him coming up to do the irrigating for me.

(Testimony of Glenn Woodbury.)

Q. There was a discussion of him coming down and putting in a garden that year?

A. He talked about it.

Q. Was that done? [144]

A. No, they never come down.

Q. You have been asked by counsel about your statement this morning that you thought you had legal title. Did you ever have a deed from Jannsen?

A. There is a deed in escrow.

Q. Did you ever have any other instrument delivered to you than the contract for deed?

A. No.

Q. When you said you thought you had legal title to it, can you explain why you thought you had legal title to it? Do you know the difference between legal title and equitable title?

A. No, I guess I didn't understand the difference. I should probably modify the statement to the fact that I thought I had title enough to transfer it to someone else, my equity. That is really what I had in mind I was doing, transferring my equity in the contract with Jannsen, and Jannsen had agreed to furnish a good title to me, and the Federal Land Bank had approved title for a loan, so I considered my contract gave me legal title, enough anyway to transfer it to someone else.

Q. Was there ever any discussion between you and Clermont or his wife concerning what kind of instrument you were going to transfer this property to him by?

A. No, all that was ever said was that I was

(Testimony of Glenn Woodbury.)

going to assign my contract to him was the way I put it.

Q. Now, after all these matters happened, counsel asked you [145] at some length about whether you or anybody on your behalf had any communications with either the Clermonts or their attorneys regarding this property, and you answered as far as you knew, no further communication had taken place, and I hand you now a carbon copy of a letter dated December 23, 1953, addressed to Mr. Russell Smith of Smith, Boone and Rimel, having the typed signature "Leif Erickson" on it, and marked "Copy, Glen Woodbury." Looking at that, do you recall ever having seen it?

Court: Mark it first, counsel.

Q. I show you this letter which is marked as Proposed Defendants' Exhibit 3, and ask you if you recall having received a copy of that letter?

A. Yes, I received this, but maybe I was confused on the question that Mr. Boone asked me.

Q. We will go into that later. I want to find out about this now. A. I remember this.

Q. You overlooked that letter?

A. The way I thought the question was was from the time I got this registered letter, or from the time I sent the letter telling them I would have my attorneys check the abstract, until the time he filed suit is what I thought the question was.

Court: That is what the question was. [146]

A. This was after the suit.

Mr. Rimel: We object to Defendants' Proposed

(Testimony of Glenn Woodbury.)

Exhibit 3, your Honor, upon the following grounds: First that the letter is irrelevant; secondly that it is not the best evidence; we have the original here in our file; thirdly, that it is dated December 23, 1953, several months after commencement of this litigation; and lastly, on the general ground that it is correspondence between counsel with reference to a pending lawsuit and has no bearing upon the issues in the case.

Court: I don't see that it is material, counsel.

Mr. Erickson: The only materiality of it is in view of our pleadings that we are still ready, willing and able to perform.

Court: Well, I still don't see its materiality.

Mr. Erickson: It has some self-serving purpose. The only purpose in doing it, or offering it, the way the record now stands under cross examination of Mr. Boone, Mr. Woodbury has sat back during all this time without making any attempt to do anything to wind the deal up.

Court: It was with reference—as the witness pointed out, that was with reference from the time of the commencement of negotiations until the commencement of the suit that the questions had reference to. This letter wouldn't have any bearing on that. The objection is sustained.

Mr. Erickson: I will withdraw the offer. [147]

Court: Very well. Court will stand in recess until quarter after 3.

(10-minute recess.)

Q. Mr. Woodbury, why didn't you do anything

(Testimony of Glenn Woodbury.)

yourself from July 27th, the date you received the letter, on to the date of the suit, in connection with this title proposition?

A. As quick as I found out they had objection to the title, I turned it over to my attorneys. They said they would take care of it for me.

Mr. Rimel: Just a minute, object to any conversations with attorneys.

Court: Yes, the objection is sustained.

Q. Did you understand your attorneys were handling the matter?

A. Yes, they were going to handle it for me. I didn't have the slightest idea how much correspondence had been handled between them and other attorneys, and my instructions to them were to——

Mr. Rimel: This is objected to as a self-serving declaration.

Court: Sustained.

Q. Now, was there any other reason why you didn't do anything about it besides the fact your attorneys were handling the matter for you?

A. I didn't think there was anything wrong with the abstract, [148] and I figured there was \$16,000 still payable to Mr. Jannsen, and he had agreed to make good title, so I figured the \$16,000 would well cover any defects that might be in the title. While I didn't think there were defects, I figured still there was plenty of encumbrance against the place to cover them if there was.

Q. The original contract for deed between you and Jannsen, do you know where that is?

(Testimony of Glenn Woodbury.)

A. The original?

Q. Yes. You say you had some sort of escrow agreement.

A. There is one copy of the original in the Stevensville bank.

Q. You had your own original?

A. I had an original and Jannsen had an original, I guess. I don't know which was the original, but we all had a copy.

Q. Now, counsel called your attention to Paragraph 3 of the contract which says that seller shall pay all taxes and assessments for 12/12 of 1953. Did you ever have an agreement to pay the 1953 taxes in your discussions with Clermont?

A. No.

Mr. Erickson: That is all.

Mr. Boone: No further examination, your Honor.

Court: Very well, you may be excused.

(Witness excused.) [149]

PAT HAGARTY

called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Your name is Pat Hagarty? A. Pat Hagarty.

Q. You are the Pat Hagarty to whom reference has been made in the proceedings so far?

A. Yes, sir.

Q. Where do you reside, Mr. Hagarty?

(Testimony of Pat Hagarty.)

A. At Stevensville.

Q. At present are you at Stevensville?

A. Yes.

Q. But for the last several weeks where have you been?

A. Been at Glasgow and Great Falls.

Q. And you appear here on subpoena, do you not?

A. Yes, sir.

Q. In coming here, you came from Glasgow?

A. That's right.

Q. Did you come here for the purpose of this hearing?

A. That's right.

Q. You are intending to return to Glasgow at its conclusion?

A. Yes, for a few days.

Q. Now, you are in the real estate business?

A. Yes, sir.

Q. At Stevensville?

A. Yes.

Q. How long have you been in business there?

A. About six years.

Q. And is your business rather extensive?

A. Yes, sir.

Q. Can you tell us a little about the volume of business you do down there?

A. I do about a half a million a year.

Q. And I am referring now to the Bitterroot Valley, what percentage of that has to do with Bitterroot transactions?

A. Up to this year it has been approximately 95 percent, but this year I have sold some ranches outside.

Q. What percentage of business in the Bitter-

(Testimony of Pat Hagarty.)

root that you do is connected with ranch properties?

A. One hundred percent, practically all ranches and farms.

Q. Have you bought and sold ranches in the immediate vicinity of the farm designated as the Jannsen place?

A. Yes.

Q. How extensively?

A. I think I sold on all sides.

Q. And in the immediate vicinity?

A. Yes.

Q. When you say "on all sides," do you mean ranches adjoining [151] it?

A. That's right.

Q. Are you acquainted with the plaintiff here, Mr. Clermont?

A. Yes, sir.

Q. Are you acquainted with his wife?

A. Yes, sir.

Q. Designated as Albert Clermont and Marguerite I. Clermont in the complaint, you are acquainted with both of those people?

A. Yes.

Q. When did you first meet them?

A. It would be on the first day of May, I believe.

Q. Of 19 what?

A. 1953.

Q. Where did you meet them?

A. I went down to a restaurant. A man there in the restaurant, Mr. Carson, called me up and told me they were down for lunch and were in the Bitterroot looking for a farm.

Q. You met them at the restaurant?

A. I went down and met them at the restaurant.

(Testimony of Pat Hagarty.)

Q. At that time was there any discussion between you and the Clermonts about the Jannsen property?

A. I asked him what kind of place he had in mind, how much money he had, how much he wanted to pay on the place. I told him I had a good place out there about 12 miles out of town; it had pretty good buildings on it, a pretty good farm, [152] that I could sell him for, I had it listed for \$38,000, and that there was an awful good contract on it; there was about \$18,000 there carrying three percent interest, payable \$1,000 a year.

Q. You are talking about—you were talking about the Jannsen place?

A. The Jannsen place, yes. So he become interested in this place and I took him out to look at it.

Q. And in that first conversation, when you referred to the contract, were you referring to what has been here designated as the Jannsen contract?

A. Yes.

Q. That was a contract between Jannsen and Woodbury? A. Woodbury.

Q. Now, when you took him out to look at it on that first trip, did you see the Woodburys?

A. No, we didn't go up to the Woodburys ranch. We went to the Jannsen place the first day.

Q. Who was along on that trip?

A. A man by the name of Hamill and his wife, I believe, of Frenchtown.

Q. They came with the Clermonts?

(Testimony of Pat Hagarty.)

A. Yes.

Q. Was anyone else there? A. No. [153]

Q. Now, what transpired on that day?

A. Well, we went out and went over the land and went through the buildings. Mrs. Clermont and Mrs. Hamill went through the buildings. We walked out over the land, and well, we spent approximately, I don't know, maybe about an hour around the place, walked up to the hay land and around at that time. Then, he told me he didn't know for sure where he wanted to locate, but I gave him the full price and the contract terms and everything, and naturally, I didn't know for sure if he was interested. We meet a lot of people that way, just lookers, you know, but he said they would think it over and come to see me in a couple of days.

Q. In that first discussion you mentioned contract terms. What was that discussion about?

A. Of course, I used that for a selling point, the three percent interest on the contract they were assuming. It was a very good selling point, this three percent interest, because, you know, most interest runs five percent.

Q. Did you then have specific reference to the Jannsen contract? A. At all times.

Q. Did you make that clear to Mr. Clermont?

A. Very clear, sir.

Q. Any discussion at that time about the water?

A. Yes. [154]

Q. What was that?

(Testimony of Pat Hagarty.)

A. He asked me where this water come from, and I told him it come from Como Lake. We talked about how far it was to Como Lake and how the water come down and all.

Q. Did you explain to him then that the water costs were charges against the land?

A. About \$4.00 an acre I think I told him.

Q. Did you explain to him that had to be paid with the taxes? A. Yes.

Q. At that time? A. Yes.

Q. Now, is there any further discussion on that first meeting you now recall?

A. Well, I don't recall. Mr. Hamill went out and looked at the land. He lived in the valley here for many years. He walked over the land, and he made the remark "This is good soil."

Mr. Rimel: Just a minute. We are going ahead with the conversations under the general objections, as I understand, but I don't think we should get into what Mr. Hamill said.

Mr. Erickson: I didn't intend to elicit that and ask that the last answer be stricken.

Court: Yes.

Q. When did you next see Clermont? [155]

A. I think it was two days later he came back. He came alone, him and his wife and children come the next time.

Q. Where did they come then, to your office?

A. Yes.

Q. What time of day was that?

A. Well, I think it was approximately about 10

(Testimony of Pat Hagarty.)

o'clock, maybe 10:30, between 10 and 10:30.

Q. What did you do then?

A. I took them out to the farm.

Q. Did you go back to the Jannsen farm itself?

A. Yes.

Q. At that time did you meet Woodbury there on the farm?

A. We saw Woodbury in the fields, so we went over and talked to him.

Q. Present at that conversation were Woodbury, Clermont and his wife and some children and yourself, is that correct?

A. That's right. Another man on a tractor was there, Mr. Briggs.

Q. Could that have been Roy Marie instead of Mr. Briggs?

A. I am not very sure. It comes to me now, I guess it was Marie. I didn't pay attention to him.

Q. Do you know who he was? I mean did he have some official reason for being out there?

A. No, just working for Woodbury on a tractor.

Q. It was a hired man of Woodbury's? [156]

A. I couldn't swear, really to be honest, I couldn't swear to it which one it was. I didn't have any conversation with him at all.

Q. You wouldn't remember? A. No.

Q. Some question has been raised by counsel. Do you recall any conversation between Woodbury and this man, whoever it is, to the effect that he should leave because there was a conversation going to take place? A. Oh, no.

(Testimony of Pat Hagarty.)

Q. Now, during this conversation that I am about to ask you about, did Mr. and Mrs. Clermont remain present?

A. They were all the time with me, yes.

Q. Tell us what the conversation was as it related to this matter now in dispute?

A. Well, of course, they were interested in getting Woodbury down some on the price. They wanted to get him down some on the price. We discussed it for quite a little while, and like Mr. Woodbury said first, I am very positive he asked me if Mr. Woodbury would rent the place, and we even asked Mr. Woodbury if he thought he might rent it for a year.

Q. What did Mr. Woodbury say to that?

A. No, he wanted to sell it and get his money out.

Q. Go ahead and tell us what the general conversation was.

A. Well, we talked about the price, and I told them, of [157] course, I said, "I have it listed for \$38,000. If you can do any better with Woodbury, it is all right with me." I told them that coming out. He then talked to Woodbury and tried to get him down in price. It was getting along to 11 o'clock at that time, or 11:30. At the time we didn't come to any complete agreement as to the price, and I told Mr. Woodbury, "Well, I'll take these folks into town and buy them lunch, and we will come back out after lunch and talk to you."

(Testimony of Pat Hagarty.)

Q. Was there, during that conversation, any discussion of the contract with Jannsen?

A. At all times.

Q. Having reference particularly to that day?

A. Yes.

Q. What was that conversation?

A. Well, how much he had to pay on that contract, what time of the year it come due, and what the interest was, and all to that effect.

Q. And was that discussed between the Clermonts and Woodbury and yourself? A. Yes.

Q. Was it referred to at any time as a mortgage? A. No, I made that mistake.

Q. I am talking about this conversation.

A. No, never as a mortgage.

Q. Was there any discussion at that time when you were with [158] Woodbury in the field about the water?

A. Yes, we talked about water, him and Mr. Clermont talked about water.

Q. Did you hear that conversation?

A. Yes.

Q. And did he make any inquiry as to the cost of water charged against the land?

A. I think it was discussed at approximately \$4.00 an acre, \$4.10, something like that. I think I told him \$4.00 an acre.

Q. Did you hear any conversation or any discussion about construction charges at that time?

A. Yes, it seemed to me like they did.

Q. Now, you testified—was there anything else

(Testimony of Pat Hagarty.)

in that conversation you now recall dealing with this general matter of the negotiations?

A. Well, I believe there was something mentioned that they didn't want to move on until fall, and, of course, I told him "You are entitled to a share of the crop if you are not going to move on until fall if you buy it now," and I did hear Mr. Woodbury's testimony here a minute ago regarding taxes. We write all of our taxes—that place was sold in May. Any taxes up through 1953 would have to be paid by Mr. Woodbury.

Q. Up to 1953? A. That's right.

Q. Now, you went to town with the Clermonts?

A. Yes, sir.

Q. Any discussions between you and the Clermonts on the trip to town and back at lunch time about the deal?

A. Yes, sure there was; there was conversation about how much we could get Woodbury down, and I told him it didn't make no difference to me. If he could have bought it for \$32,000, I would have got five percent commission. I told him I didn't think he would come down much and to try him for \$36,000, and Mr. Clermont seemed to be pretty well satisfied on \$36,000.

Q. Any discussion at that time concerning the contract with Jannsen?

A. Oh, we was referring to that at all times, how much the payments would be and the interest, that was my main selling point, that contract for

(Testimony of Pat Hagarty.)

three percent interest. You know, I wrote that contract, too.

Q. The contract with Jannsen?

A. Yes, sold him that place.

Q. When you say you wrote it, I understand some attorney wrote it, is that right? A. Yes.

Q. You came back out to the Woodbury place, is that true? A. Yes.

Q. A conversation then occurred in front of the Woodbury home with the Clermonts? [160]

A. In the car, yes.

Q. Mr. Woodbury was present? A. Yes.

Q. Can you tell us what that conversation was?

A. After we drove out, we were satisfied, they were satisfied they were going to take the place if Mr. Woodbury would come down in price to \$36,000 and give them half the hay, one-third of the grain, and one-third of the peas, and we drove up and Mr. Woodbury come out, and I told Mr. Woodbury, I said, "We have agreed to pay, if you let us, we will take it for \$36,000 and let him have one-third of the grain, one-third of the peas, and half the hay. I believe we can get Mr. Clermont to pay half of the taxes." So, Woodbury, he jumped at me right away. He said, "No, if Mr. Clermont buys this, he is going to pay all the taxes," so we talked about that a few minutes. Mr. Clermont agreed to purchase the place and pay all the taxes.

Q. You heard Mr. Woodbury's testimony that after that conversation, you went in the house, is that correct? A. That's right.

(Testimony of Pat Hagarty.)

Q. Was his testimony correct that you had agreed then, or they had agreed, to go ahead with the deal?

A. We sold it outside and went in there to draw up the papers in the house.

Q. When you went into the house, was there any discussion [161] of the Jannsen contract?

A. Oh, yes.

Q. Tell us what that was.

A. Well, we told him we would give him this contract, and I asked him if he wanted to go over the contract.

Q. You are referring to the Jannsen contract?

A. The Jannsen contract. He said, "No," he said, "I don't believe I would care to look over the contract now if that is the balance due on the contract," and I put it in \$16,200, the balance due on the contract, payable \$1,000 a year, three percent interest. That was the way he purchased the place. That is all Mr. Clermont was interested in.

Q. Did he look at the Jannsen contract?

A. No. I asked him if he wanted to look at it. He said, "No."

Q. Was there anything said at that time about the abstract?

A. No, I don't—well, yes, I believe Mr. Clermont brought up about the abstract, but anyway, I told him, "You have nothing to worry about the abstract. This man Jannsen got \$16,200 coming. If he can't give you an abstract, you don't pay him."

(Testimony of Pat Hagarty.)

Q. Was that said to Mr. Clermont?

A. Yes.

Q. It was said then, at that time?

A. Yes. [162]

Q. What was his answer to that?

A. It was all right with him.

Q. Was there ever at any other time any discussion about the abstract?

A. No, I don't believe so. Of course, you see, what we figured, we figured—on all my deals as a rule, we don't come out with the abstract on the first down payment——

Mr. Erickson: I believe that may be stricken.

Court: It is stricken. We don't care what you do on all your deals. We want to know what you did on this deal.

Q. Now, what further conversation took place there during the time the contract was being fixed up about what the deal was?

A. I didn't get that.

Q. Well, I wanted to get at the full conversation that took place at the time you were fixing up this contract, which was, in this case, in the house, and was there any further discussion about the Jannsen contract or the Federal Land Bank mortgage, or anything else?

A. No, we found out what balance was due on the Federal Land Bank mortgage, and approximately the balance due to Jannsen. It would have been—naturally if it was \$100 over or anything, he had agreed to buy the place for \$38,000, and he

(Testimony of Pat Hagarty.)

paid down so much money. That is all Woodbury could get anyway.

Q. You mean \$36,000? [163]

A. That's right.

Q. You heard Mr. Woodbury's testimony that he said to Clermont at the time that he wanted his money out?

A. That's right.

Q. To be out of the deal. Do you recall any conversation like that?

A. Yes.

Q. What was that conversation?

A. They talked about it and Woodbury told him he wanted all his money, but at that time Mr. Clermont didn't seem to be wanting it for any less; he seemed to have that much money.

Court: Let's take a little recess and maybe they will have this noise stopped. Court will stand in recess until quarter of four.

(10-minute recess.)

Q. Calling your attention again to the conversation you have been relating that occurred in the Woodbury house when this contract was fixed up, this contract or document is a printed form, is it not?

A. That's right.

Q. And it is a form generally used by you in your business?

A. Yes.

Q. Now, there is in the contract—I have forgotten the exhibit number of that—I think it is this document, it is Plaintiffs' Exhibit 3. I show you this instrument. You will [164] notice the language down there in the paragraph which is marked "2," "Contract for deed." You were the one that put

(Testimony of Pat Hagarty.)

that language in, were you not? Your answer is yes? A. Yes.

Q. At the time of this conversation was there anything said about when that contract for deed was to be prepared?

A. Whenever he come back with the money.

Q. What was the full discussion about that?

A. Well, he told, he said that he didn't know how long it would be, and then Woodbury asked—he kept on saying 10 days would be long enough, he would have the money by 10 days, so Woodbury told him he could have longer if he wished, so we agreed, I believe, on 30 days.

Q. And did you discuss the nature of the instrument you were going to prepare pursuant to that paragraph of the contract?

A. Assignment of the Jannsen contract.

Q. Was that specifically discussed?

A. Yes, sir.

Q. Just how specifically, what was said?

A. Well, when he come back with the money, then we would go down to an attorney, to Woodbury's attorney, and Mr. Woodbury then would give him an assignment of this contract which he was taking over, and that was really why I put contract for deed. He was just getting a contract for deed and he was assuming this contract for deed.

Q. You were the one that put the word "mortgage" in in reference to the Jannsen transaction, are you not, Mr. Hagarty?

A. Yes, I made the mistake. I should have said

(Testimony of Pat Hagarty.)

mortgage to the Federal Land Bank and contract to Jannsen.

Q. Was there any discussion with Clermont in which the Jannsen transaction was referred to as anything but a contract for deed?

A. Never in my presence.

Q. Was there any discussion with you and Clermont or you and Woodbury about this instrument at the time it was signed, particularly with relation to the matter of the mortgage to Bernhard Jannsen referred to there?

A. Repeat that, please, I didn't hear.

(Question read back by reporter.)

A. What do you mean.

Q. Did you discuss the use of the word "mortgage" in this instrument?

A. Never was brought up. I didn't know I had it in there until after this suit was brought.

Q. Now, you have heard the testimony as to the payment by Clermont of \$5,000 and that you received \$1,000 of that money, is that correct?

A. Yes.

Q. That was paid to you as part of your commission on the sale? [166]

A. As a rule, we take all of our commission, but I was sure of the deal, and I just figured I would take \$1,000, and as long as he was coming back in a couple of weeks, I would get the rest of the money. I should have taken it all.

Q. You did get \$1,000? A. Yes.

Q. You retained that \$1,000? A. Yes.

(Testimony of Pat Hagarty.)

Q. Your answer is yes? A. Yes, sir.

Q. Did you have any further conversation with Clermont after this deal was closed and the money was paid concerning this proposition, this land?

A. Yes, Mr. Clermont came back to see me in a couple of weeks later, I believe. He came back to the house to see me and as I recall, he came in. I thought he was there with the money ready to go to Hamilton to fix up the papers, you see. Instead of that, when he came back, he said he didn't think he would go through with the deal.

Q. Did he tell you that? A. Yes, sir.

Q. Who was present when he told you that?

A. Nobody. My wife wasn't home. He was all alone that day.

Q. Was anything further done at that time?

A. No. I told him to go out and see Mr. Woodbury. It was [167] all right with me if Woodbury wanted to give him his money back. It was all right with me, because I sold the place.

Q. You have testified you have been in the real estate business for sometime and handled a considerable amount of property in the Bitterroot. Had you been in the real estate business before that time? A. Five years in Miles City.

Q. Turning to May 2, 1953, what can you tell me as to the general value of Ranch properties in the Bitterroot?

Mr. Rimel: Objected to as being immaterial and irrelevant.

(Testimony of Pat Hagarty.)

Court: This is along the line—the loss that was sustained?

Mr. Erickson: Yes.

Court: Overruled.

A. Well, of course, the business fell off an awful lot now in sales. All realtors will tell you that there is few places selling, but the ones that sell are not getting the asking price they did before.

Q. With relation to May 2nd, would you say from your experience as a realtor and being actively engaged in the business, that the price of this Jannsen property fairly well reflected its valuation as of that time?

Mr. Rimel: Objected to as leading.

A. It went down considerably. [168]

Court: It shortens matters up considerably.

Q. You didn't answer the question. My question was, Mr. Hagarty, was the asking price or the price of the Jannsen property on May 2nd, would that generally reflect the level of prices then?

A. Yes, I would say.

Q. Now, since that time, what can you say as to the value of similar ranch properties in the Bitterroot?

A. Well, that would be a very hard question for me to answer.

Q. But with relation to May 2, 1953, are they up or down?

A. Naturally, we all know they are off 20 percent anyway.

Q. How much?

(Testimony of Pat Hagarty.)

A. Twenty percent, anyway.

Q. How do you know they are that much off?

A. For other places adjacent to this ranch I have sold for five or six thousand dollars under the listed price this last year.

Q. Was that the price listed in May, 1953?

A. Yes, back in there.

Q. Can you give us specific examples of places you have sold in the immediate vicinity?

A. I sold the place adjacent to this Jannsen farm we are talking about, the place adjoining him on the west. I had that listed for \$35,000 early in the spring, and I finally [169] sold it last fall for \$28,000.

Q. When you say it was listed, is that just somebody's idea of what they had hoped to get, or would that have been the fair value at that time?

A. You don't know. These prices owners put on there, of course, they are putting on too high prices, I know that.

Court: I don't think we need proceed any further with this, it doesn't mean anything.

Mr. Erickson: I am trying to elicit from the witness that the value of land is lower now.

Court: He says he has to sell at lower prices than the listed prices. That doesn't give us any information at all, no basis to find any fact.

Q. Have you bought and sold land in the vicinity of the Jannsen property at or around May, 1953?

A. Yes, I sold a 200 acre farm in there.

(Testimony of Pat Hagarty.)

Q. Have you had occasion to resell that farm since May, 1953? A. Yes.

Q. Can you tell us what the property sold for when you sold it around May, 1953?

Mr. Rimel: Objected to as irrelevant and immaterial.

Court: Sustained.

Mr. Erickson: May it please your Honor, in anticipation of the objections, I have gone in a little bit into the matter [170] of how I was going to prove the difference in value, and the general rule in Jones on Evidence, and also in the Cyclopedia of Trial Practice is that you may prove value of property by comparison between the sale price at a certain date and a later sale price, or by evidence of specific sales, or by expert testimony of the witness, and it is for that reason that I am asking to develop this line of testimony.

Court: Well, you haven't proceeded on that line at all. You have asked this man if he sold another farm somewhere near or adjacent to it, and he said yes that he sold it for more one time, or he is going to testify he sold it for more in 1953 than he could sell it for in 1954, I suppose. That doesn't fulfill the requirements.

Mr. Erickson: The rule is if you have evidence of sales of similar property in the immediate vicinity that you may then introduce it to prove value. I may not have laid a sufficient foundation.

Court: You may use it to show the qualification of the witness to testify as to value if you prove

(Testimony of Pat Hagarty.)

(Testimony of Pat Hagarty.)

that it is a similar piece of property, and the sale was conducted under the same general conditions. There is just no foundation for the testimony so far.

Q. Now, this piece of property you are about to testify to, what piece of property is that?

A. Which? [171]

Q. That you have sold?

A. That was the Cranz place.

Q. Whereabouts is it with relation to the Jannsen place?

A. Well, it borders it on the west.

Q. What is the nature of that farm?

A. Practically the same as the Jannsen place.

Q. Is it irrigated land?

A. I believe about the same.

Q. How much irrigated?

A. About 120 acres, I believe.

Q. Is it under the same ditch? A. Yes, sir.

Q. What are the improvements on it?

A. The improvements, I would say, are fair.

Q. How do they compare with the improvements on the Jannsen property?

A. Well, they had a new house on it; pretty well. Woodbury's outer buildings, barns, were much better than on the other place.

Q. So your testimony is that the property would be substantially or very much the same?

A. I would say.

Q. Now, when did you sell the Cranz place first?

A. I sold that in April, I believe, of 1953.

Q. And how was that sold, was it a forced sale,

(Testimony of Pat Hagarty.)

or did you [172] go out and sell it just as you did the Jannsen property?

A. No, no, just got it listed and sold it.

Q. To whom did you sell that property?

A. A fellow by the name of Rancier.

Q. Was it, were the terms of the sale measurably different than the terms of this sale?

A. A smaller down payment.

Q. Was it sold also on a contract for deed proposition? A. Yes.

Q. What was the price you sold it for in April, 1953?

A. I sold it in April, 1953, for \$28,000.

Q. In April, 1953? A. Yes.

Q. You said yes? A. Yes.

Q. Now, have you since sold that property again?

A. Yes, last fall.

Q. And you sold it then as agent of Rancier, is that correct? A. Yes.

Q. Was that a sale in the normal course of business? A. Yes.

Q. Do you know whether or not it was a forced sale so far as Rancier was concerned, that he was in distress or anything when the sale was made?

A. No, I wouldn't say that; no, I don't think so. [173]

Q. If it was, you wouldn't know anything about it, are you saying that?

A. Well, I wouldn't care to disclose.

Mr. Rimel: What was that last?

Court: He wouldn't care to disclose.

(Testimony of Pat Hagarty.)

Q. Did you offer that place for sale for any considerable period of time before it sold?

A. Yes, I had it quite a little while, approximately two or three months.

Q. Did you show the property to more than one buyer? A. Yes.

Q. How many about?

A. Probably eight or 10.

Q. You finally sold it, is that true?

A. Yes.

Q. What was the price you received?

Mr. Rimel: I didn't get the date of the sale.

A. I am pretty sure without checking into my books, I believe it was April, 1953, I wouldn't want to say for certain as to the exact date.

Q. That was the first sale? A. Yes.

Q. We are talking about the second sale. When did that occur?

A. About the 20th of November last year. [174]

Q. Of 1953? A. Yes.

Q. The witness indicates "Yes", Mr. Reporter. Now, for how much was it sold?

Mr. Boone: Objected to as incompetent, irrelevant and immaterial, no proper foundation having been laid.

Court: Sustained. He testified in the first place, counsel, to a general conclusion that the ranch, that the property he sold was similar to this other, but that kind of testimony, that expert testimony, should be based upon facts as to the kind of land, the situation of the land, what it raises. This calls for ex-

(Testimony of Pat Hagarty.)

pert testimony, a conclusion based upon facts that we can rely upon, not upon his general conclusion that it was the same. Then, he goes along further and says, "Well, I don't want to tell you the circumstances under which it was sold, I don't care to disclose that." So, we can't use it at all.

Mr. Erickson: I believe your Honor may have overlooked the fact I asked him how long he had it listed, how many people it was shown to. I think that might overcome his failure to disclose.

Court: I don't think it does. I wouldn't be interested in this sale under these circumstances, a failure to give us facts from which it could be reasonably found that these were similar pieces of land in the same locality, and the same [175] crops and so forth, and particularly then when he comes along and says there are some things in connection with the sale he wouldn't want to disclose to the Court. We can't consider it at all, so let's proceed to another matter.

Q. Mr. Hagarty, based on your experience in this business, you have already testified, I believe, that the values of property in the immediate vicinity of the Jannsen property, and by reason of your experience, you estimate to be down 20 percent over what they were in May, 1952, is that a correct statement? A. Yes.

Q. And is the market for similar ranches at the moment good, bad, indifferent, or what have you to say as to that? A. Not very good.

(Testimony of Pat Hagarty.)

Q. Is there much property moving down there?

A. Not very much, no.

Mr. Erickson: I wonder if I may have a few minutes, your Honor, to discuss with the witness the matter of these similar sales, because I feel they may be important to me. I thought I had all the information I needed from the witness, but apparently not. He has the facts for various other sales. I would like to take a look at them to be sure I haven't overlooked them.

Court: Very well, Court will stand in recess until quarter after four. [176]

(10-minute recess.)

Q. Calling your attention now, Mr. Hagarty, to the Jannsen property, based on your experience in the real estate business and the fact you have been down there for a number of years and are familiar with the area, do you have an opinion as to what the value of the Jannsen place is today compared with its value on the market in May, 1953?

A. I would say off about 20 percent.

Q. Just a minute, just answer the question yes or no.

A. Yes.

Q. What is your opinion?

Mr. Boone: Objected to on the ground the witness has not shown himself qualified as an expert.

Court: He has testified he has been in the real estate business down there buying and selling ranch properties to the extent of half a million dollars a year over a period of time of five or six years, and he has also testified generally that he is familiar

(Testimony of Pat Hagarty.)

with the market value of lands in the area. What further qualifications do you think is necessary?

Mr. Boone: I think, your Honor, that he has to base it on experience of other transactions, other sales, and so on. I don't think he can testify to the value with respect to one piece of property. It may be up or down with relation to other transactions he has handled.

Court: That is something you can cross examine him on, [177] but I think to qualify generally, I think that he has, of course, to possess, to show specific transactions, not to show the value of this property, but to show his knowledge of the property or properties generally and his familiarity with the market in the community. He can relate 50 or 100 sales, not to show the value of this property, but to show he has been selling property; but I think that the witness has qualified sufficiently to answer the question. The objection is overruled.

Mr. Erickson: That is the view I take, your Honor. I was really trying to qualify the witness by this discussion of other sales.

Court: Yes, you can show other sales just to the extent of showing he has dealt in property, not to prove the value of this property. You show those sales to show his experience, but when you start to introduce the evidence to prove the value itself, those specific sales can only be introduced under particular circumstances, and the details are important that were not disclosed here.

Mr. Erickson: If there is a question as to the

(Testimony of Pat Hagarty.)

qualification of the witness, the extent of his experience would indicate the degree of his qualifications.

Court: That's right. They can cross examine further on that line if they wish. Proceed.

Q. Mr. Hagarty, you heard Mr. Woodbury's testimony that he [178] had listed the property again, is that correct? A. Yes.

Court: He didn't answer that first question. He answered yes.

Witness: I was going to say about 20 per cent. That is what I was going to say.

Court: Is that an answer to the question? I am not sure. That answer was stricken at that point. Now you may answer the question.

Mr. Erickson: I believe the record will show he said yes, and I said then what is your opinion as to the value of the Jannsen place today as compared with May, 1953? A. About 20 percent.

Q. Off. A. Yes.

Q. You heard Mr. Woodbury testify as to his listing the property with you again, is that your recollection of the matter? A. Yes.

Q. About when was that?

A. Well, that was a couple of months, I imagine, a couple of months after he got into this deal, but I never did do much on it because the place was—I didn't know for sure if he could sell it or not.

Q. Did he express that view to you? [179]

A. Yes.

Mr. Erickson: That is all.

(Testimony of Pat Hagarty.)

Cross Examination

Q. (By Mr. Boone): How much real estate have you sold in 1954?

A. I have sold about \$225,000.

Q. How much did you sell in 1953?

A. \$480,000, approximately.

Q. You mentioned to us when talking about values in the Bitterroot today that prices were off about 20 percent of prices that were listed with you, is that right? A. That's right.

Q. In other words, you are basing that 20 percent on what people come in and list property for as to what you are able to sell it for?

A. That's right.

Q. So, your conclusion on depreciation in value is based upon the difference between the listing price and the selling price? A. That's right.

Q. And that is your sole conclusion and sole basis for your expression of your opinion here?

A. That's right.

Mr. Boone: We now move to strike all the testimony this [180] witness has given with respect to values, your Honor.

Court: I don't think the motion to strike is proper, but the witness' conclusion in the light of his testimony will be weighed.

Q. Now, you have mentioned that in your experience as real estate agent, you have been using the form of agreement which was used in this case?

A. Yes.

Q. And I take it that in handling real estate, too,

(Testimony of Pat Hagarty.)

Mr. Hagarty, you try to be cautious?

A. That's right.

Q. You, I assume, would want the parties to know, the seller and buyer, the terms on which the property is being sold and purchased?

A. That's right.

Q. And it is your desire in handling transactions like that one to make sure your contract or your agreement that you prepare reflects correctly the agreements of the parties?

A. That's right.

Q. And you do take care in drawing your contracts that way, I take it?

A. Well, I make a little mistake once in awhile like on that mortgage.

Q. But you use caution to try and see your agreements properly reflect the agreement of the parties?

A. That's right.

Q. I also take it in handling real estate transactions, you want to have people read contracts or agreements before they are signed?

A. They have that right, surely.

Q. You recommend that, don't you, to where they know what is in the agreement?

A. I generally always take the form out and give it to them, give each of them a copy to look over first before they sign it, as a rule.

Q. That is after the form is filled in?

A. Yes.

Q. I take it you followed that same practice in this particular case between the Woodburys and Clermonts?

(Testimony of Pat Hagarty.)

A. As I recall it, in the Woodbury case, I didn't have a typewriter with me that day, and I wrote that out in long hand, and I handed it to Mrs. Clermont. I can't say whether Mr. Clermont read the contract or not, but I handed Mrs. Clermont one, and I don't just recall at this time if I handed Mr. Woodbury a copy of that or not, to be positive.

Q. You do recall making that up in three copies, don't you? A. Yes.

Q. And you heard Mr. Woodbury testify that he got one copy? A. Yes.

And the Clermonts one copy, and you had a copy?

A. Yes.

Q. So, there were three copies of it. Now, isn't it your testimony now that you handed a copy to the Woodburys and a copy to the Clermonts to read before it was signed?

A. I just don't quite remember. As a practice that is the way I do, but I just don't quite recall there whether—I just can't remember for sure how I did that, but I remember Mrs. Clermont reading a copy of it, handing her one. I don't remember Mr. Clermont did.

Q. Do you remember handing Mr. Woodbury a copy and having him read it?

A. I will tell you, to be honest with you, I handed him a copy. I couldn't swear if he read it.

Q. You did hand him a copy?

A. I am positive I handed him a copy when I tore them out.

Q. Did he look at it? A. I couldn't say.

(Testimony of Pat Hagarty.)

Q. You are sure Mrs. Clermont read her copy?

A. Mrs. Clermont, yes, she went over hers. In fact, as a rule, I give them all copies then I read the contract over myself and let them follow, you know.

Q. In other words, you read it out loud to them?

A. Yes.

Q. Did you do that in this instance?

A. I believe I did, I would say. [183]

Q. So that the contract, as it was written out, and the same as it is today, it is your recollection you read that out in detail to the parties?

A. That is the way I generally always do. I am pretty positive it was that way.

Q. When you say you read it to them, would you say, Mr. Hagarty, that you read these parts here which have reference to the mortgage to Jannsen, you read that part too, and then this part down below about the mortgage to B. Jannsen, you read all of that, did you, out loud to them?

A. It seems like I read that.

Q. Yes, and as far as the parties were concerned, there were no objections raised by Mr. or Mrs. Woodbury as to anything you had read?

A. No, it was agreeable by all.

Q. And the same as far as the Clermonts?

A. Yes.

Q. After that had been read in its entirety to them, the four people, two couples, signed the contract?

Mr. Erickson: I am going to object to the form

(Testimony of Pat Hagarty.)

of the question because the witness' testimony isn't that positive.

Court: Overruled. He may examine him about it and determine whether it is positive or not. Proceed.

Q. My question was, after you had read it in detail to them, the entire contract, the two couples, the Clermonts and the [184] Woodburys, then signed.

A. Yes. I don't know which ones signed it first.

Q. But there were no changes made after you read it? A. No.

Q. No changes requested by either couple?

A. No.

Mr. Boone: No further examination, your Honor.

Court: Any redirect?

Redirect Examination

Q. (By Mr. Erickson): Mr. Hagarty, going to the matter of the value of the property down in the Bitterroot now as compared with 1953, Mr. Boone asked you if your conclusion that the property was down in value 20 percent was based solely on the difference between the value of it as listed with you and the price it would actually bring. Tell us just exactly what you meant by that statement.

Mr. Boone: Objected to as immaterial, your Honor.

Court: Overruled.

A. You mean the value of the place today in dollars and cents as to what it was valued at in 1953?

(Testimony of Pat Hagarty.)

Court: No, he means what did you mean when you said that is the method you used in arriving at your conclusion as to the values being down now as compared to May, 1953. [185]

A. Well, with the demand for places here a couple of years ago, you didn't have to come down in price in order to sell the place as much as you do now. People are more price conscious.

Q. Mr. Hagarty, maybe we could arrive at it quicker. You know about what lands generally would bring in 1953? A. Yes, I do.

Q. Now, by comparison to—speaking of all land in the general vicinity, and what it was bringing in 1953, through your sales experience, and your knowledge of real estate, can you tell us whether, in your opinion, those same lands, I mean lands generally, will bring a different price now than in 1953?

A. Most all the lands being sold is being sold for at least 20 percent less than in 1953.

Q. Than they sold for in 1953?

A. That's right.

Q. So that your opinion is not based solely on the listing, but based on your knowledge and experience?

A. Oh, no. You get a listing, you can't tell what they put on the listing.

Q. So, your opinion then is not based on the statement you made that you got your opinion solely because they were down 20 percent from what they were listed for? A. Oh, no. [186]

(Testimony of Pat Hagarty.)

Q. It is on your experience and knowledge of the general real estate picture in the Bitterroot Valley? A. That would be right.

Mr. Boone: I am objecting to the testimony of counsel, your Honor.

Court: Yes, it is leading.

Mr. Erickson: It is understood you can lead an expert.

Court: Yes.

Q. Mr. Hagarty, you testified as to reading the contract to the Clermonts and the Woodburys. Is it your testimony you did read it, or is it your testimony that you think you read it?

A. Well, it seems like I read it. I am in the habit of doing that, giving each one a copy and then reading it to them to see if there is any changes they want in it or anything. When we got through with this, why nobody complained.

Q. Can you say for certain that you did or did not?

A. I wouldn't want to say for exactly whether I read it or not.

Mr. Erickson: I believe that is all.

Recross Examination

Q. (By Mr. Boone): Your recollection is that you did?

A. My recollection is just as I said, that I thought I did, [187] but I wouldn't swear to it for sure.

Mr. Boone: That is all, Mr. Hagarty, thank you.

(Witness excused.)

Mr. Erickson: That is all I have, your Honor, except I might like to introduce one other witness as to values if the opportunity exists tomorrow, that is, if we are still here, but outside of that, the defendants rest. That is all we have.

Mr. Boone: I can assure the Court we will make every effort not to be here tomorrow.

Court: Any rebuttal.

MARGUERITE CLERMONT

one of the plaintiffs, recalled as a witness on her own behalf, having previously been sworn, testified as follows:

Direct Examination

Q. (By Mr. Boone): Mrs. Clermont, you have previously testified here today? A. Yes.

Q. And have you been in the courtroom during the testimony that was offered by Mr. Woodbury and Mr. Hagarty? A. Yes.

Q. Now, with reference to statements that they had made, first now with reference to statements by Mr. Woodbury, you heard him testify that there were conversations between you and him and Mr. Clermont with respect to this Jannsen property [188] with respect to there being a contract against the Jannsen property which you would be taking over, and that there was no mention made of a mortgage to Jannsen, I will ask you if there were any conversations in the negotiations with Mr. Woodbury where the situation with Jannsen was characterized as a contract with Jannsen, called a

(Testimony of Marguerite Clermont.)

contract or a contract for deed with Jannsen?

A. I can't remember hearing anything about a contract for deed. We were under the impression that it was a mortgage; it should have been a mortgage.

Mr. Erickson: May the answer——

Court: Yes, that portion of the answer referring to her impression may be stricken.

Q. Do you have any recollection that Mr. Woodbury told you he had a contract with Jannsen?

A. No.

Q. What did he tell you he had with respect to his relationship with Jannsen?

A. He said that we would carry a mortgage with Mr. Jannsen.

Mr. Erickson: I am going to now have to move to strike that question, no time or place is fixed and no foundation for the question.

Court: Well, it is a little late, but I will sustain it, and go back and fix the time.

Q. On what occasion when you talked to Mr. Woodbury about the [189] purchase of this property before entering into the contract, was it one or more occasions?

A. We spoke to him on one occasion only.

Q. Are you referring to one day or more than that?

A. We spoke to him in the forenoon on the Jannsen place, and then returned after having lunch in town with Mr. Hagarty and spoke to him again in the afternoon at his home.

(Testimony of Marguerite Clermont.)

Q. Is that the same day the contract was entered into? A. Yes.

Q. Was that the only day before the contract was signed that you had any conversations with Mr. Woodbury? A. Yes.

Q. About the purchase of this property?

A. Yes.

Q. Is it those conversations that your previous answer related to?

A. About this contract for deed?

Q. Contract with Jannsen?

A. Yes, that is the only conversations.

Q. So, as I understand it, in those conversations there was never any mention made of a contract with Jannsen? A. No.

Q. But there was mention made of a mortgage with Jannsen? A. Yes.

Q. Now, in those same conversations on that day, again referring [190] to the testimony of Mr. Woodbury, he testified that your husband asked him as to how the ranch was irrigated and how much was for maintenance and how much for construction charges. Now, was there any discussion with respect to maintenance charges and construction charges on the irrigation? A. No.

Mr. Erickson: To which we will object on the ground there is no foundation. It seems to me Mr. Clermont would be the only witness qualified to testify on that. There would have to be some showing she was in a position to have heard all the conversation. I don't think that is established.

(Testimony of Marguerite Clermont.)

Court: She can only testify with reference to conversations she participated in or heard.

Mr. Boone: I will put a preliminary question.

Court: Yes.

Q. Were you present, Mrs. Clermont, during all of the conversations that took place between Mr. Woodbury and your husband with respect to the purchase of this property before the contract was signed? A. Yes.

Q. Was there any mention made in those conversations or any inquiry by your husband as to what charges were against the property for maintenance and what charges were against it for construction?

A. No, because they are not words he would use in his vocabulary anyway. [191]

Q. In your previous experience farming, have you ever had occasion to be on a farm in an irrigation district? A. No.

Q. Have you ever had any connection with irrigation districts in your previous experience?

A. Never.

Q. How long had you and your husband been farming before May, 1953?

A. My husband a little longer than I, 32 years myself, 22.

Q. In that 22 years with your husband farming, there has never been any experience with an irrigation district? A. No.

Q. In that 22 year period, have you and your

(Testimony of Marguerite Clermont.)

husband lived and operated a farm in the United States? A. No.

Q. Now, again referring to those same conversations, the negotiations for the purchase of this property, was there anything said, Mrs. Clermont, about a lien being against the property in favor of the United States for irrigation district charges?

A. No.

Q. When this contract was prepared by Mr. Hagarty, as he has testified to, what did the people do before signing that contract, you and Mr. Clermont and Mrs. Woodbury and Mr. Woodbury?

A. You mean at the home of Mr. Woodbury?

Q. Yes.

A. I believe we came after lunch, so we went directly into the living room.

Court: Isn't this evidence we have already had?

Mr. Boone: About the reading of the contract I am referring to, your Honor. It wasn't in our case in chief.

Court: Well, proceed.

A. We went to the living room. Mr. Hagarty took a place at the head of the dining room table. Mr. Woodbury was practically ahead of him on the other side of the table; my husband was on the left of Mr. Hagarty; I was on the chesterfield across the room with Mrs. Woodbury.

Q. What did the people do before signing that agreement?

A. We did talk over a few of the details, and my husband mentioned that—"Now," he says, "I

(Testimony of Marguerite Clermont.)

may not have—you ask for \$16,500. I may have only \$16,000,” he said, “I want it to be put down like that on the paper,” and Mr. Hagarty raised his hand. He says, “Oh, well, if I were you, I wouldn’t worry about something like that, that would be straightened out, some little detail.” I don’t know what they were going to do. Maybe we should have looked into this a little closer.

Q. What did you do about reading the contract?

A. Mr. Hagarty did read the contract. [193]

Q. Out loud? A. Out loud.

Q. And after that did the parties sign it?

A. Yes. I took time to read mine, I believe a few minutes after he had spoken or read his, and I believe that Mr. Woodbury had a copy in front of him. He looked as if he was reading it as I was.

Q. Now, after this agreement—well, go back again to these conversations. Were there ever any conversations with Mr. Hagarty, either on the day this contract was signed, Mrs. Clermont, or the previous occasion when you had been up there a day or two before, were there any conversations in which Mr. Hagarty told you this property was subject to a contract in favor of Jannsen? A. No.

Q. Was there anything in those conversations with Hagarty with respect to a mortgage to Jannsen?

A. I believe he mentioned a mortgage, now, I can’t say for sure, but the word “contract for deed,” I don’t remember hearing it.

Q. Was there anything in those conversations

(Testimony of Marguerite Clermont.)

with him when he mentioned the property was subject to a lien for irrigation charges?

A. No, we knew nothing of it.

Q. Now, after the contract was entered into, there has been [194] testimony entered here that you went to Mr. Woodbury and told him you were having trouble getting your money out of Canada, and also testimony from Mr. Hagarty that you didn't intend to go through with the deal. Now, I will ask you if you did advise Mr. Woodbury that you were having trouble getting your wheat money?

A. Yes.

Q. Was there discussions about changing the date of payment?

A. No, they refused to make any further extension on the time, and in fact, we even asked them if they would be willing to return us all of our money or part of it, and wait to be sure we had our money, as we had received word recently, a few days later, from the Wheat Board stating that it was impossible for them to guarantee delivery of that wheat by the end of May, as they had given us reason to believe before.

Q. All right, now, after that conversation with Mr. Woodbury, did you then come to Missoula to make arrangements, financial arrangements for the money that would be necessary to meet this contract?

A. Yes, we did.

Q. And were you, on June 15th, ready and willing financially to make the payment which was required under this contract to the Woodburys,

(Testimony of Marguerite Clermont.)

\$11,000, if the title had been satisfactory?

A. Yes.

Q. Now, with respect to the statement by Mr. Hagarty that [195] you did not intend to go through with the deal, did you make that statement to him?

A. No, Mr. Boone, we didn't make that statement, and may I further say, I don't believe Mr. Hagarty—in fact, I know Mr. Hagarty wasn't in no condition——

Mr. Erickson: May I object to the answer as not being responsive to the question and a volunteered statement.

Court: Sustained.

Mr. Boone: The answer with respect to the denial of the statement is there?

Mr. Erickson: I didn't make objection to that.

Q. Mr. Hagarty testified, Mrs. Clermont, that while you were negotiating, and before you signed this contract, he got out the Jannsen contract and showed it either to you or to your husband?

A. Oh, no.

Mr. Erickson: Wait a minute. I must object to that because that isn't the testimony.

Court: I don't recall that counsel.

Mr. Boone: I am sorry, your Honor, but I very definitely have a recollection, and a note that "we looked over the Jannsen contract," Hagarty testifying, that he had the contract out.

Court: I don't recall it. I recall Mr. Woodbury

(Testimony of Marguerite Clermont.)

testifying with reference to the Jannsen contract being in his papers there. [196]

Mr. Boone: And also the statement that Mr. Clermont didn't want to look at it, that he testified to, your Honor. He testified he had the contract out and handed it to Mr. Clermont, but he didn't want to look at it.

Court: Let's check the record then on it. It doesn't jell with me at all.

Mr. Erickson: The question would still be objectionable because it states the contract was there.

Court: Yes.

Mr. Boone: That part I was mistaken in. Was there any conversation or statements by Mr. Hagarty asking Mr. Clermont if he wanted to look at the Jannsen contract?

A. I can't recall any conversation like that.

Mr. Boone: That's all.

Cross Examination

Q. (By Mr. Erickson): When was it you made arrangements in Missoula to get the balance of the \$11,000?

A. I beg your pardon, Mr. Erickson, we didn't need \$11,000 balance.

Q. What was the amount you needed?

A. We figured we would be short maybe between one and two thousand dollars, depending on how much grain was coming through [197] by the end of May.

Q. What were the arrangements you made in

(Testimony of Marguerite Clermont.)

Missoula so you had the balance on June 15, 1953?

A. The arrangement was with Mr. Hamill if we needed help to prevent us from losing our \$5,000 deposit. He didn't want see us lose it. We intended going through with the contract, but he told us——

Q. Just a minute, your conversation with Mr. Hamill is not proper here, Mrs. Woodbury, or Mrs. Clermont, I am sorry. What did you do after you made arrangements with Mr. Hamill? Did you communicate the fact to Mr. Woodbury that you had the money available?

A. No, at that time we had been refused even—how do we say—a meeting with Mr. Woodbury. He had turned his back on us when we asked for an audience.

Court: Just direct your answer to the question specifically. Is not the question "Did you make any effort to communicate that to Mr. Woodbury"?

A. No.

Q. And what was the date you had the money ready?

A. We could have that ready before the 15th.

Q. And did you communicate to your attorney that you had the money available before the 15th?

A. At the time we hired Mr. Boone to read the contract, or the abstract, I should say, because Mr. Hamill was willing to [198] help us, providing that the abstract and all the titles and all the papers concerning this property was clear.

Q. So, you did not, on June 15, 1953, have the

(Testimony of Marguerite Clermont.)

actual money in hand to pay Mr. Woodbury, is that the situation?

A. No, in regards that the abstract had not been read.

Q. Your answer is no, you did not have the money. A. Didn't have it right then, no.

Q. What was the last conversation you had with Mr. Woodbury prior to the time you wrote the letter of June 11th?

A. It was later, I believe, or just at the end of the second week of May.

Q. Where did that conversation take place?

A. On the hillside just inside his boundary gate of his own farm.

Q. Who was present at that conversation?

A. Mr. Clermont and I and Mr. Woodbury.

Q. Was the topic of this discussion the contract you had with Mr. Woodbury?

A. It was for an extension of time, or if they refused us an extension, would they give us part of our money back, or all of it and wait until we were sure of getting our money from our wheat and not have to impose, we figured, on our friends here in Missoula.

Q. Was anything said at that time about revamping the contract in any manner? [199]

A. I don't understand what you mean.

Q. Was anything said about rewriting the contract? A. No.

Q. In your various conversations with Mr. Woodbury after the contract was made, you indi-

(Testimony of Marguerite Clermont.)

cated to him you were having trouble about raising the money. Was anything said about waiting until June 15th and then drawing a new contract?

A. No.

Q. Never anything said to you or Mr. Clermont in your presence by Mr. Woodbury that when June 15th came, and you didn't have the money that you would work out a new contract? A. No.

Q. Did you overhear any conversation in which Mr. Clermont said to Mr. Woodbury in words to this effect: If I did that, I would just be depending on your word. Do you recall any such conversation?

A. You mean about extending the time?

Q. Yes.

A. I believe that Mr. Clermont asked him—yes, he did ask him for an extension, and he said. "Well," he says, "we will work out something."

Q. Woodbury said they would work out something?

A. He refused to put it in writing. We went there that day with the intention he would put it in writing.

Q. Your contention that Mr. Woodbury turned his back on you [200] and was adamant in the matter is restricted to the testimony you now give that he wouldn't write a written contract?

A. We understood he refused.

Q. Was anything said by Mr. Woodbury that his word was good? A. You mean he said so?

Q. Yes.

(Testimony of Marguerite Clermont.)

A. He said his word was all right, sure, you wouldn't say——

Q. Now, Mrs. Clermont, I just want an answer to the questions here. You have testified here pretty positively and pretty directly on this matter. Now, I want the whole story. Your conversation took place outside the gate at the time Mr. Clermont told Mr. Woodbury he didn't have the money, did he not?

A. Not at that time.

Q. That is, he didn't have the money at that time? A. Yes.

Q. And from that time on until suit was brought, did he ever tell Mr. Woodbury that you did have the money available and would go through with the contract if the title was proper?

A. From the time the suit was brought in?

Q. No, from the time of the last conversation with Woodbury when you told him you didn't have the money, did you then any time after that tell Mr. Woodbury that you did have the money?

A. That would be after the last conversation we had with him? Q. Yes.

A. No, we never saw Mr. Woodbury again. [201]

Q. Did you make any attempt to see him at that time? A. No, we felt rebuffed.

Q. Prior to the conversation outside the gate, did you have other conversations with Woodbury about having the contract modified, or being given time to pay?

A. On more than one occasion, I believe on two occasions we went to see Mr. Woodbury, and Mrs.

(Testimony of Marguerite Clermont.)

Woodbury, his wife, even drove into town with us to see Mr. Hagarty to see if we could work out some plan.

Q. But no plan was worked out? A. No.

Q. On each of those two occasions did you explain to Mr. Woodbury you were not going to be able to get the money together by June 15th?

A. Not on our own and without help.

Q. The reason you wanted the change is because you were having difficulty in getting the money, is that correct? A. Yes.

Q. Now, calling your attention to your testimony that you don't recall hearing Mr. Hagarty or Mr. Woodbury ever refer to the Jannsen transaction as a contract for deed, your testimony is that you don't recall ever hearing that transaction referred to in that way? A. Not as a contract for deed.

Q. How was it referred to? [202]

A. The word "mortgage" comes to my mind and opinion as the word used.

Q. Now, at the first meeting, do you recall whether Mr. Hagarty spoke of that as a mortgage?

A. Yes, I can say he called it a mortgage.

Q. Whereabouts did he say that?

A. This was on the Jannsen farm just near his field where he was planting peas.

Q. Is that the first reference made by Mr. Hagarty to the Jannsen transaction?

A. Yes, that was—no, the first day Mr. Woodbury was not there, just Mr. Hagarty and ourselves.

Q. Now, Mr. Hagarty testified in the restaurant

(Testimony of Marguerite Clermont.)

there was a discussion of how the property was held from Jannsen. You don't recall any such conversation?

A. We talked about the value of land, how the ditches operated, and small, I would say insignificant conversations that didn't pinpoint anything, just as an interested party would be inquiring about a farm.

Q. Was anything said at that meeting at the restaurant in Stevensville about the interest to be paid Jannsen?

A. We understood there was interest of three percent.

Q. Was that discussed to a considerable degree between you? A. No.

Q. You have no recollection at the first meeting that anything [203] was said about the Jannsen contract?

A. The word "contract" does not come to my mind at all.

Q. So, when you testified that the words "contract for deed" didn't come to your mind, you also mean the word "contract" doesn't come to your mind as well as the words "contract for deed"?

A. I believe that is what you call it, yes.

Q. Do you recall the testimony of Mr. Hagarty that the offer was made in the house to show you the contract for deed with Jannsen? I mean you recall his testimony?

A. Yes, I recall the testimony.

Q. Were you present during all of those conver-

(Testimony of Marguerite Clermont.)

sations so you would have heard anything Mr. Hagarty said during the time you were preparing the contract? A. Yes.

Q. What was the discussion, if there was a discussion, about the Jannsen transaction at that time?

A. As close as I can recall, we were to have a mortgage balance to Mr. Jannsen of \$16,000 at three percent interest.

Q. And how was that mortgage to be transferred to you, how were you to acquire the mortgage, or the interest in that mortgage?

A. I can't recall we went into that in detail.

Q. Was anything said about the assignment of the mortgage to you? [204]

A. I don't recall that either.

Q. Was anything said about an assignment at all?

A. I don't recall anything concerning an assignment.

Q. The contract on its face reads you were to have a contract for deed. Was that discussed?

A. No.

Q. What kind of instrument did you expect to get title under in this transaction?

A. We expected to have a straight mortgage with Mr. Jannsen and a Federal Land Bank mortgage.

Q. Who was going to have the deed to the property? A. We figured it would be Mr. Jannsen.

Q. Now, what is your recollection of the conversation about the water?

A. As far as I know, the only information that

(Testimony of Marguerite Clermont.)

we asked for was how much it cost per acre.

Q. And what was told you about that?

A. It was, I believe he said at the time that it was anywheres between \$3.80 and \$4.00, around there.

Q. Who told you that?

A. Mr. Hagarty was the first one that informed us as we asked that first day we were on the farm.

Q. Do you recall any conversation in which either you or Mr. Clermont were referred to the County Courthouse or water office to get details on that?

A. I don't remember any conversation of that kind.

Q. Did you make any investigation about that water?

A. No, we didn't, because we didn't consider that there was anything other than paying, we would pay approximately \$4.00 a year to have this water for irrigating. We never expected there was any cause to go down there.

Q. Do you recall any conversation about some of the water charge being paid off eventually?

Court: Is this proper cross examination, counsel?

Mr. Erickson: I believe so, because she has testified no conversation was had about the water. That is all her direct, and it seems to me on cross I can lead the witness, which I am doing.

Court: Very well, proceed.

A. State the question again, please?

Q. Yes. Was any conversation had about paying off any part of this water charge? By that I mean

(Testimony of Marguerite Clermont.)

did you discuss that part of it would eventually be paid out?

A. Are you referring to the lien?

Q. No, the water.

A. The yearly water charge?

Q. Yes. A. That is paid twice a year.

Q. You may have misunderstood my question. Was anything said about eventually part of this charge being paid off so it [206] wouldn't be so high in future years?

A. I didn't understand it that way.

Q. You don't recall any conversation?

A. No, I don't.

Q. Now referring to the actual signing of the contract that is here an exhibit, do you recall whether you signed that before the sheets were torn out of the book, or after?

A. That is a very difficult question to answer, I couldn't say that we did sign it before or after.

Q. You couldn't say? A. No.

Q. You observed, I think, in looking at your copy that it is a carbon copy, is that correct?

A. Yes.

Q. Do you recall whether Mr. Hagarty read all of the contract? A. Yes.

Q. And did he read, do you recall he read, for example, the language which appears in the contract, "All irrigation fixtures and equipment, plumbing and heating fixtures and equipment, including stoker and oil tanks, water heaters and

(Testimony of Marguerite Clermont.)

burners," and so forth, was that all read to you, the fine print?

A. It was all read if it was on that sheet— I beg your pardon, now, did he list all those articles there?

Q. Perhaps if I show you the contract, Mrs. Clermont, it would [207] be fairer to you.

Court: He is referring to the first printing after the first space there, you see.

A. That is right here indicating, your Honor, you mean right here?

Court: Right there.

A. As far as I can recall, Mr. Hagarty read this copy.

Q. How long did it take him to read it?

A. It is very hard to say.

Q. What do you remember?

A. Oh, I should judge it didn't take more than 10 minutes.

Q. You recall it took him about 10 minutes to read it?

A. It would take that.

Q. Now, referring to that paragraph number 2 there, where it speaks of contract for deed, you have already testified you weren't quite sure what that called for, is that your testimony, you didn't know just exactly what that was going to be?

A. I can't say we didn't know; we were sure it was the same thing as a mortgage. We have had mortgages in Canada, and that is the only term we really understood, and we figured it was the same way here and in this instance.

(Testimony of Marguerite Clermont.)

Q. So that a contract for deed, in your opinion, was going to be a mortgage under which you would have a mortgage payable to Jannsen, is that correct?

A. Yes. [208]

Q. You understood, did you not, Mr. Woodbury would be out of the transaction entirely after he had received his money? A. Yes.

Q. And that from then all of your transaction was going to be between Jannsen and yourselves and the Federal Land Bank, is that true?

A. Yes.

Q. You understood about the Federal Land Bank Mortgage? A. We knew that part, yes.

Q. You heard the testimony that Mr. Hagarty offered to show you the contract with Jannsen. Is it your testimony—do you recall that? A. No.

Q. And is it your testimony that he at no time offered to show you the instrument they had with Jannsen? A. No.

Q. Are you saying it didn't happen, or you just don't remember whether it happened or not?

A. I don't remember ever hearing of a contract being offered to us with Jannsen.

Q. Did you inquire any further as to the terms of the Jannsen transaction other than to learn the amount of annual payment and interest?

A. No, we believed that was covered right there in that contract we drew up that day. [209]

Q. Did you hear any discussion on the day of the contract, May 2nd, of the abstract?

A. No.

(Testimony of Marguerite Clermont.)

Q. You heard Mr. Hagarty's testimony as to his conversation with Mr. Clermont? You heard that testimony? A. Yes.

Q. Are you saying you didn't hear any conversations to that effect?

A. I heard nothing about an abstract being offered.

Q. Was anything said as to when you would get an abstract? A. No, not at any time.

Q. Do you recall anything about when the contract for deed, whatever it was to be that was to transfer the property to you, was to be completed and the whole transaction closed?

A. Repeat that again, please.

Q. Reference is made to a contract for deed here in which you were to get title, or whatever the instrument was to be. Was anything said at the house as to when that portion of the transaction was to be taken care of so the deal would all be closed?

A. He gave us to the 15th of June.

Q. Was anything said indicating you might pay earlier than that? A. No.

Q. So that the testimony of Mr. Hagarty and Mr. Woodbury that [210] your husband said to them that he might pay earlier if he got the money, that is not according to your recollection?

A. I can't recall that for myself.

Mr. Erickson: That is all.

Redirect Examination

Q. (By Mr. Boone): As I understand it, at the

(Testimony of Marguerite Clermont.)

time you talked to Woodburys when you knew you were having trouble getting your wheat money, you were only \$2,000 short of having enough money to make the \$11,000 payment? A. Yes.

Q. You came to Missoula, and when you came to my office, arrangements had been made to obtain the necessary money from friends? A. Yes.

Q. Did you, after the 11th of June, receive wheat money from Canada to where you had the \$11,000 and more? A. Yes.

Q. When did you receive that wheat money?

A. We received one payment at the end of May, and the balance the first week of June; I believe it was the first week of June.

Q. So that do I understand that when the 15th of June came, you had you own money to make that payment? [211] A. Yes.

Q. Now, with respect to this property, counsel asked you as to what you were to receive. I realize you are not familiar with legal terms, but was it your understanding you would receive this property subject to those two mortgages? A. Yes.

Q. To Jannsen and the Federal Land Bank?

A. Yes.

Q. And when you paid those two mortgages off, you would own the property? A. Yes.

Mr. Boone: That is all.

Recross Examination

Q. (By Mr. Erickson): Mrs. Clermont, when did you go to Canada in 1953? A. In 1953?

Q. Yes, after this deal?

(Testimony of Marguerite Clermont.)

A. We crossed the 7th of September.

Q. Did you come back that fall?

A. No, we never come back since until last Friday.

Q. You were not here in the United States when the complaint, which is dated October 3rd, was prepared, is that correct? A. No, we were not.

Q. Now, Mrs. Clermont, you testified on my examination that [212] you didn't have the money on June 15th without getting some money from Mr. Hamill. Now, you testified you did have your wheat money before June 15th, which is correct?

A. I beg your pardon, did I say we had it at all? I meant by that we had it to satisfy Mr. Woodbury's demand, but it wasn't necessarily all our wheat money. Some of that was coming from Mr. Hamill, if we needed it.

Mr. Erickson: Yes, that clears it up.

May your Honor please, I indicated to the Court my great desire to be done today, but it looks to me as though it is going to be very difficult to be done because I think there is one more witness for the other side, and obviously it is going to be necessary for us to have some rebuttal testimony, and because of the importance of Mrs. Clermont's testimony, if the Court is of the view we should adjourn for the day, I should like to do so with Mrs. Clermont.

Court: I would like to finish with her if we could. We have been going with her for the last 40 minutes.

Mr. Erickson: I don't anticipate asking any more questions, but because of the complete variance of

(Testimony of Marguerite Clermont.)

her testimony with the testimony of our witnesses, I might have overlooked something, so I would let her go, understanding I reserve the right to recall her.

Mr. Boone: May I ask her one or two questions?

Court: Very well. [213]

Redirect Examination

Q. (By Mr. Boone): Where were you June 15, 1953? A. Huson, Montana.

Q. When did you receive the final wheat payment from Canada? A. July 29, 1953.

Mr. Boone: That is all.

Court: Very well, you may be excused. Take the stand in the morning again if counsel wishes.

Mr. Erickson: I may not, I think I am through.

Court: Do you have some more testimony?

Mr. Boone: We have some, one further witness, your Honor.

Court: We have arrived at this point in the trial of this case where I do have something to say to all the parties concerned. That is simply this: I hope they have learned a lesson, the Clermonts and Woodburys and Mr. Hagarty. It seems to me if they spent a few dollars and hired a lawyer before getting into these difficulties, you would be way ahead. It seems to me if Mr. Hagarty would devote his time to selling real estate instead of trying to practice law, he would save his clients a lot of time, trouble, worry, money and expense. The idea of a person trying to draw contracts and giving advice, telling

him not to pay any attention—by his own testimony, “Oh, well, the abstract, that is simple”—I forget what words he used, but in other words, that it didn’t [214] amount to anything, that they had plenty of recourse. He doesn’t know what recourse they have, he doesn’t know. You understand the difficulties he was placing people in, his own clients as well as other people he was dealing with. It is a pretty serious thing. I hope all of you, both parties and Mr. Hagarty and all other real estate dealers, come to well understand that they have got to be careful. Lawyers spend their lives and great money educating themselves, and still they, with all the care that is exercised, make errors and mistakes and give poor advice sometimes, but with it all, surely, surely a person in the position of a salesman should not ever try to interfere with the lives and fortunes of people. Without regard to where the answer in this case lies, that much is obvious, that they had better hire lawyers before they get into difficulties, and that people who have no right should not be trying to advise persons with reference to legal problems. It is a serious matter. Court will stand in recess until 10 o’clock tomorrow morning.

(Whereupon, a recess was taken until 10 o’clock the following morning, November 30, 1954, at which time the following proceedings were had:)

Court: Call the next witness.

Mr. Boone: We were finished with Mrs. Clermont unless counsel——

taxes—" then there is a parenthesis—"water for 1953—" there isn't a close in the parenthesis there—no, your Honor, I am mistaken, there is no parenthesis on the original. I don't want to mislead the witness.

Mr. Rimel: Whatever it is——

Mr. Erickson: No, that is just the "4" going down.

Mr. Rimel: ——I think it speaks for itself, your Honor.

Court: Yes, just present it.

Mr. Erickson: I am wondering if counsel is now withdrawing his objection.

Mr. Boone: No, the objection is not withdrawn because [216] your statement to the witness was

MARGUERITE CLERMONT

one of the plaintiffs, recalled for further recross examination, [215] having previously been sworn, testified as follows:

Recross Examination

Q. (By Mr. Erickson): Mrs. Clermont, yesterday we discussed this agreement which is Plaintiffs' Exhibit 3, and there is on the exhibit "Purchaser is to pay taxes and water for 1953." Do you recall the discussion about that? A. No.

Mr. Rimel: We object on that question. It says "to pay taxes, parenthesis, water." I think counsel's statement was "taxes and water."

Mr. Erickson: Well, whatever the language is. I believe the exact language is "Purchaser is to pay

(Testimony of Marguerite Clermont.)

“taxes and water”, which is definitely not on there.

Mr. Erickson: Okay.

Court: Let me see it. It is just “tax” apostrophe “s” “water”.

Q. Calling your attention to this language in the contract, “Purchaser is to pay tax’s water 1953”, do you recall any discussion of that prior to the time the contract was signed?

A. No, not that I remember.

Q. Do you remember any discussion at all about who was to pay for the water in 1953?

A. I can’t recall and be specific; I know there was some.

Q. Do you recall whether there was any at the time the contract was signed?

A. No, I can’t recall that.

Q. Do you recall any discussion in the field at the Jannsen place about where the water came from to irrigate the land?

A. I remember hearing my husband ask where the water came from.

Q. Do you recall what the reply was?

A. I can’t remember the name of the lake; you mentioned it yesterday; so I can’t say. I heard the lake, you know, mentioned.

Q. Any reference made to the “Big Ditch”?

A. I just heard “Large Ditch, “Big Ditch”.

Q. Did you know which ditch it was?

A. No.

Q. Do you know whether or not in getting into the Jannsen place, particularly the place where Mr.

(Testimony of Marguerite Clermont.)

Woodbury lives, you cross the Big Ditch?

A. No.

Q. Do you recall in going to the Woodbury place you go along a ditch?

A. I remember now a large ditch, I believe, going in from, I think it is the west side; the Jannsen place likewise; and there was a large ditch I noticed on the left side as we drove along towards his home.

Q. Do you know whether that is the ditch from which the water comes for the Jannsen place?

A. No, I can't say I knew it; I might suspect so.

Q. You testified yesterday afternoon you went to Canada sometime in September. How long after you went to Canada was it before you bought this store you have spoken of?

A. We crossed on the 7th of September, and we bought that store the 15th of March of this year.

Q. And between the time you crossed and the time you bought the store, what line of endeavor was your husband engaged in?

A. He was working on a farm, a dairy farm.

Q. Mrs. Clermont, on the day the contract was signed, do you recall whether there was any discussion about going into a [218] lawyer to fix up the final papers? A. I don't remember that at all.

Q. You said yesterday that Mrs. Woodbury sat with you on a couch while these transactions were going on? A. Yes, a chesterfield, I believe.

Q. Are you quite sure about that?

A. Very sure.

Q. If Mrs. Woodbury testified she was out in

(Testimony of Marguerite Clermont.)

the kitchen doing dishes during the discussions, would you think she was wrong?

A. If she was——

Mr. Boone: We object to the question.

Court: Sustained.

Q. But you are very sure she was sitting on a chesterfield with you during the discussions?

A. I can't recall she left at any time.

Q. Now, to try to fix the time at which the contract was read, as you said it was read yesterday. Can you say now whether it was read before Mr. Hagarty tore the sheets out of the book to which there has been reference made, or afterwards?

Mr. Boone: Objected to as repetitious. Counsel inquired along the same line.

Court: It is repetitious—objection overruled.

A. I can't say for sure, I believe I told you yesterday.

Mr. Erickson: That is all. [219]

Mr. Boone: No further questions, Mrs. Clermont.

(Witness excused.)

ALFRED CLERMONT

one of the plaintiffs, recalled as a witness on his own behalf, having previously been sworn, testified as follows:

Direct Examination

Q. (By Mr. Boone): Mr. Clermont, were you present in court yesterday when Mr. Woodbury and also Mr. Hagarty testified? A. Yes.

Q. You were here in Court? A. Yes.

(Testimony of Alfred Clermont.)

Q. Now, referring to the testimony of Mr. Hagarty for the moment, you will recall that he testified to certain conversations with you and with Mrs. Clermont when you first saw him and went out to look over the farm. Do you recall that he testified to those conversations? A. Yes.

Q. He testified with respect to telling you and your wife about Woodbury having a contract with Jannsen on the property. Was there any statements by Mr. Hagarty that Woodbury had a contract with Jannsen? A. No.

Q. What did he say, Mr. Clermont, as to what Woodbury had [220] with Jannsen?

A. Well, he had, between the National Bank and Mr. Jannsen there was a \$20,000 mortgage.

Q. A \$20,000 mortgage? A. Yes.

Q. Now, referring to conversations which Mr. Woodbury testified to on the day you talked with him and on the day you signed this agreement, did Mr. Woodbury tell you that he had a contract with Jannsen? A. No.

Q. What did he say he had with Jannsen?

A. There was a mortgage with Jannsen and this Federal Bank.

Q. And the Federal Bank? A. Yes.

Q. Now, referring again to conversations with Mr. Hagarty, was anything said by Hagarty to you as to a lien on the water? A. No.

Q. In your conversations with Mr. Woodbury, was anything said by Mr. Woodbury that there was a lien because of the water? A. No.

Mr. Boone: That is all.

(Testimony of Alfred Clermont.)

Cross Examination

Q. (By Mr. Erickson): Mr. Clermont, did Mr. Hagarty discuss with you at the [221] first time you met the terms of the agreement between Jannsen and Woodbury?

A. Well, yes, the terms to pay this——

Q. Jannsen? A. \$1000 a year.

Q. And did he say what the interest was?

A. At Three percent.

Q. Now, in the conversations with Woodbury and Hagarty, was it your impression that a new contract was going to be drawn between you and Woodbury or that you were going to take over whatever contract or paper he had with Jannsen?

Mr. Boone: Objected to as improper cross examination.

A. No, I was going to take it——

Court: Just a minute. Sustained.

Mr. Erickson: If your Honor please, he has presumed to testify as to what was said about the agreement.

The Court: The direct examination has just been with reference to two conversations, as I recall it, directed toward two different matters.

Mr. Boone: That is correct.

Mr. Rimel: Whether or not there was a contract or mortgage.

Court: And second, what was said or done about the lien on the water.

Mr. Erickson: I was under the impression, your Honor, [222] particularly since the witness is one

(Testimony of Alfred Clermont.)

of the parties, that when on direct examination he testifies as to what his understanding of the nature of the instrument was, I would be entitled to develop the full conversation as to what the nature of the instrument was.

Court: He wasn't testifying as to what was the nature of the instrument, he was testifying with reference to the conversation. If you want to open it, I will permit you on cross examination to go into it a little, but we have already covered it.

Mr. Erickson: I am only asking for conversations. We haven't covered it from this witness.

(Question read back by Reporter.)

Court: Obviously that is clear out of line of the direct examination. I am going to sustain the objection. We can get right back into the whole case again if we go along that line. Limit your cross examination to the points raised on direct.

Mr. Erickson: Very well.

Q. You are saying now that at no time did either Mr. Hagarty or Mr. Woodbury refer to the Jannsen transaction as anything but a mortgage?

A. Yes.

Q. Now, with reference to the water, you said that at no time was anything said to you that the charge for water was a lien on the land, I think that is correct. Now, were there [223] discussions as to what charges were to be paid for water?

A. Yes, Mr. Woodbury said between three and a half or four, they would run in that price line.

Q. A year? A. Yes.

(Testimony of Alfred Clermont.)

Q. And was that discussed at some length between you Mr. Woodbury and Mr. Hagarty?

A. I don't remember. Like I say, that come through the taxes. I don't remember it throwed the lien, so much an acre on that, I never got it clear anyway that way like it is mentioned today.

Q. You don't recall you were told by either Mr. Woodbury or Mr. Hagarty that there was a charge against the land? A. No.

Q. Are you saying that wasn't said or you just don't remember?

A. Well, I can't say it was said really clear in my mind.

Q. And did you hear the testimony yesterday in which they said they told you the water came from the Big Ditch and that the Government had it, or something to that effect? A. Yes.

Q. And they said that, did they?

A. It seems to me they said that yesterday.

Mr. Rimel: Just a minute, I think the witness may have been confused.

Court: He said, "Yes, they said that yesterday."

Q. Do you recall they said that to you at any time during your negotiations?

A. Yesterday?

Q. No, what I am asking, Mr. Clermont, they said yesterday they had talked about the ditch being a Government ditch. Do you recall now that during the time you were discussing the transaction, the deal, with them there was any discussion about that?

A. No.

(Testimony of Alfred Clermont.)

Q. Are you saying there wasn't any discussion about the ditch being a Government Project?

A. No.

Q. You are saying there wasn't any?

A. No, there wasn't none.

Q. Now, do you recall whether there was any discussion about where you could find out in detail about the amount of the water charge and the project?

A. No.

Q. Mr. Woodbury testified yesterday he told you you could get all the information at the courthouse or water office. Do you recall any such conversation?

A. It seems to me—you know, it is a little bit blurred to me, but it might come. Like I say, I have heard it a lot through the summer too with Mr. Shaffer too when I started working at those places, but right at the time being it wasn't clear to me. [225]

Q. At the time you were negotiating with Mr. Hagarty and Mr. Woodbury for the purchase of this place, you were employed on a farm, an irrigated farm, were you not?

A. Yes.

Mr. Boone: Objected to as improper cross examination.

Court: It is, but proceed.

Q. You worked on an irrigated farm?

A. Yes.

Q. At Frenchtown?

A. Yes.

Q. Do you know whether or not it was under a Government Irrigation Project?

A. Yes, he got it under through the summer like I say, as we went along.

(Testimony of Alfred Clermont.)

Q. How long had you worked there prior to the time you entered into these negotiations?

A. I was just beginning there, really.

Mr. Erickson: That is all, Mr. Clermont.

(Witness Excused)

Mr. Boone: The plaintiffs rest, your Honor.

PEARL WOODBURY

one of the defendants, called as a witness on her own behalf, being first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): You are Mrs. Glen Woodbury? A. Yes, sir.

Q. You are one of the parties in this action?

A. Yes, sir.

Q. Mrs. Woodbury, when did you first see the Clermonts?

A. The day they came to our house to sign up a contract.

Q. There has been reference to a conversation that was held in a field prior to the time the contract was signed. You weren't present at that conversation, were you? A. No, sir.

Q. Now, calling your attention to the time they came to your house, were you in the room during the time these negotiations were being carried on?

A. Not all the time, no, sir.

Q. Mrs. Clermont testified you sat with her on a chesterfield during all the time and didn't leave

(Testimony of Pearl Woodbury.)

the room, is that correct? A. No, sir, it isn't.

Q. Where were you?

A. I was in the kitchen part of the time.

Q. How much of the time did you spend in the room?

A. I went in and met the Clermonts and I went to the kitchen and they called me in the dining room to sign the contract.

Court: Counsel, I am not clear in my own mind that that is what the witness, Mrs. Clermont, said. As I recall her [227] testimony she was saying all of the time during the reading of the contract that Mrs. Woodbury was present.

Mr. Erickson: That isn't my recollection, but I will fix the time.

Court: First the time with reference to that, then we can find out from the record later.

Q. Yes. How much of the time were you in the—strike that. How long did these negotiations last in your house?

A. I imagine a couple of hours, probably.

Q. How much of that time were you in the room?

A. Oh, about a half-hour, I would say.

Q. Speak up just a little louder.

A. About a half-hour.

Q. Do you recall whether Mr. Hagarty read the contract during that time?

A. I didn't hear him read it.

Q. Now, with reference to the time you were supposed to have sat on the couch or chesterfield with

(Testimony of Pearl Woodbury.)

Mrs. Clermont, did you sit on the couch with her during that period of time at all?

A. What do you mean?

Q. During the two hours that these negotiations took?

A. When they first came in and I met them, I sat down there and talked to her a little while.

Q. Now, you signed the contract, did you not?

A. Yes, sir. [228]

Q. Can you tell me whether—what the condition of the contract was when you signed it? Did you sign more than once?

A. No, I didn't.

Q. Do you recall the condition of the contract when you signed it?

A. It was a book page laid there, and I went to the table and signed it.

Q. Are you saying that the sheets were bound in a book at the time you signed it?

A. Yes, sir.

Q. Did you yourself read the contract prior to the time you signed it?

A. No, sir, I didn't, I was busy.

Q. You relied on your husband in the transaction?

A. Yes, sir, I did.

Q. What were you doing at the time, or just prior to the time you came in to sign the contract?

A. I was in the kitchen washing dishes.

Q. Did you have to make any preparations before coming in?

A. I dried my hands, of course.

Q. You went right from washing the dishes to sign the contract?

A. Yes, sir.

(Testimony of Pearl Woodbury.)

Q. Did you hear any of the discussions leading up to the signing of the contract there at your house that day? [229]

A. For me to sign it?

Q. No, I mean any discussions between Mr. Hagarty, Mr. Clermont and Mr. Woodbury?

A. Not too much.

Q. Would you say what you heard was too fragmentary to be of much assistance?

A. Yes, that's right.

Q. After that time did you see the Clermonts again? A. Yes, sir.

Q. When did you next see either Mr. or Mrs. Clermont?

A. Mr. Clermont came to our house about two weeks later.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Did it concern this deal you had made?

A. Well, he came on the back porch, and he was stuck in the mud that day, and my son went and pulled him out, and they came to our house and had dinner, and then he was in the dining room talking about it, Mrs. Clermont and I were in the kitchen.

Q. Any discussion then about the contract or about the sale that you heard? A. No, sir.

Q. And when next did you see either of the Clermonts? A. About a week later.

Q. Who did you see then? [230]

A. Mr. Clermont.

Q. Did you have a conversation with him?

(Testimony of Pearl Woodbury.)

A. He came to the porch and wanted to know where my husband was.

Q. Were just the two of you there?

A. Yes, sir.

Q. Was there any discussion about the sale?

A. That is the day he wanted to know if I thought my husband would give him his money back.

Q. What was the rest of that conversation?

A. I said that my husband was an honest man, and he wondered if my husband would give him the money back.

Q. You say he wondered if your husband was honest?

A. I said I had said my husband was an honest man. He said he wondered if he would give him his money back. I said he would have to go talk to my husband.

Q. Did he give you any reason why he wanted his money back? A. No, sir.

Q. Was that the extent of the conversation that day? A. Yes, sir, I sent him on up the road.

Q. You sent him on up the road to see your husband? A. To see my husband, yes, sir.

Q. Did he return to the house later that day, or did you hear any part of the conversation between him and your husband? A. No, sir. [231]

Q. Did you have any further conversation with either of the Clermonts about this transaction?

A. No.

Q. Mrs. Woodbury, were you present at any conversation in which there was any discussion of the

(Testimony of Pearl Woodbury.)

contract with relation to its terms after the time it was made? A. Yes, I was.

Q. When was that?

A. The day we went in to see Mr. Hagarty?

Q. Who was present at that conversation?

A. Mr. and Mrs. Hagarty—I mean Mr. and Mrs. Clermont, my husband and I.

Q. Was that at your house?

A. We went in to see Mr. Hagarty. As we was coming out, I heard my husband tell him after the 15th he would make him a new contract.

Q. That discussion was with Mr. Clermont?

A. Yes.

Mr. Erickson: That is all.

Cross Examination

Q. (By Mr. Rimel): Mrs. Woodbury, did you sign the contract, Plaintiffs' Exhibit 3, which I will show to you, without reading it?

A. I did not read it. [232]

Q. And yet you placed your signature on the contract below that of your husband?

Mr. Erickson: I believe the witness has already answered that she did.

Court: Yes.

Q. Is that correct? She nodded her head. Prior to signing it, did you determine it had been read by your husband?

A. I didn't know for sure. Like I say, I was in the kitchen.

(Testimony of Pearl Woodbury.)

Q. Did you ask your husband if he had read it before you put your signature on it?

A. I don't ask my husband if he does things.

Q. You just signed it without either reading it or determining if he had read it?

Mr. Erickson: She has answered the question, your Honor.

Court: Yes, yes, she has.

Mr. Rimel: That is all.

(Witness Excused)

Court: Call the next witness.

GLENN WOODBURY

one of the defendants, recalled as a witness on his own behalf, having previously been sworn, testified as follows:

Direct Examination

Q. (By Mr. Erickson): Mr. Woodbury, you testified yesterday, did you not? [233]

A. I did.

Q. And you have been present here during the testimony of both Mr. and Mrs. Clermont, have you not?

A. That's right, I have.

Q. Now, with reference to the conversations concerning the Jannsen transaction, did you at any time ever refer to the Jannsen transaction as a mortgage?

Mr. Boone: That is objected to as improper rebuttal.

Court: Well, in a way, yes, the rebuttal was that he had referred to it as a mortgage and not as a contract, but he has previously testified that he re-

(Testimony of Glenn Woodbury.)

ferred to it as a contract and not as a mortgage.

Mr. Erickson: I have some additional questions I wanted to ask him, and this is preliminary.

Court: Very well, proceed.

Q. The question again, please?

(Question read back by Reporter.)

A. I did not.

Q. Why didn't you ever refer to it as a mortgage?

A. Because I always thought of it as a contract.

Q. Did you have a copy of it? A. I did.

Q. Had you read that copy? A. I had.

Q. And that instrument was prepared by an attorney, was it not? [234] A. That's right.

Mr. Boone: We object to this as improper surrebuttal. It is just repetitious of what he said on direct examination.

Mr. Erickson: I am not sure whether this is surrebuttal or whether it is rebuttal. I don't know it makes any difference.

Court: All of this testimony so far is already in. I think the whole thing is there.

Mr. Erickson: My position in the matter probably is—I thought it was correct—but we have a situation here where the Court is forced on some of these matters to decide which of the witnesses is telling the truth.

Court: Yes.

Mr. Erickson: And you have a situation where the plaintiffs have come in now—I guess it is surrebuttal—the plaintiffs have come in and categori-

(Testimony of Glenn Woodbury.)

gorically challenged the truth of the witness and his memory, and it seemed to me in view of their testimony I would have the right to be sure this witness hasn't now changed his position by being reminded of something he may have overlooked before.

Court: On that basis we will try the whole case again. You just keep going back explaining everything all over again. This witness has already testified that he had a contract with Jannsen, that it was prepared by an attorney, that he had a copy of it in his desk, that the offer was made at the time of [235] the conversation at the house to produce that. All that is here in the record.

Mr. Rimel: I was going to add, your Honor, it doesn't, in my opinion, assist the Court to——

Court: The surrebuttal here is designed to answer anything new that arose as a result of the rebuttal. Now, the rebuttal, as I understand it, didn't raise anything new at all, it just constituted a denial of some of the things that were testified to in the defense.

Mr. Erickson: I think that is correct.

Court: There was nothing new actually raised as far as I can see, but if you want to clear up some of those matters you think are not clear, why fine, let's go ahead and do it.

Mr. Erickson: That was the purpose.

Court: Just so we don't get too far afield.

Mr. Erickson: I don't intend to. I have notes

(Testimony of Glenn Woodbury.)

on three questions. Of course, one question often breeds several more.

Court: Yes.

Q. Was there an answer to the last question?

A. I think I answered it under protest.

Q. Not on your part, objection on the part of counsel? A. Yes.

Q. Now, at the time this instrument was signed by you and by the Clermonts—I believe this is a matter on which this witness has not testified. [236]

A. You are referring to this instrument?

Q. That instrument, yes, Exhibit 3. Do you recall the condition in which that instrument was at the time you signed it?

A. It was in Mr. Hagarty's form book that he has them in and carbon copies.

Q. Mrs. Clermont testified that was torn out and read to you, and my understanding was that that reading occurred before it was signed. Do you recall anything about the contract having been read aloud by Mr. Hagarty?

A. No, I don't recall it being read aloud at all.

Q. Did you read it before you signed it?

A. No, not that I recall.

Q. Do you recall reading the part he had written in? A. No.

Q. Was there any discussion at that time concerning the final form of agreement that was to be entered into?

A. I think I testified to that yesterday.

Q. I don't believe so, but what was it?

(Testimony of Glenn Woodbury.)

A. When they came with the additional \$11,000, we were to go to an attorney and make an assignment of my contract with Jannsen.

Mr. Erickson: I think that is all.

Court: Any cross examination? [237]

Cross Examination

Q. (By Mr. Boone): Mr. Woodbury, will you say definitely that Mr. Hagarty did not read this contract to all of you?

A. No, I don't believe I testified that yesterday, and I can't testify it today. I don't remember of him reading.

Q. So, you can't say today whether he did or did not read it? A. No.

Q. Are you definite that you didn't read it?

A. No, I couldn't swear I didn't read it, I don't recall reading it.

Mr. Boone: That is all.

Mr. Erickson: That is all.

(Witness excused.)

Court: Do you want a recess.

Mr. Erickson: Yes, if I could have a couple minutes.

Court: Court will stand in recess until quarter after 11.

(10-minute recess.)

Mr. Erickson: We have nothing further to offer. We rest.

Mr. Boone: Nor do we.

Court: What is the next move with reference to this?

Mr. Boone: We request time be allowed for the purpose of findings of fact and a memorandum to the Court. [238]

Court: Yes, how much time does the plaintiff need?

Mr. Rimel: Ten days or 20 days.

Mr. Erickson: Maybe I can assist in fixing the original time if I tell the Court my situation. I am going to be tied up in trials for the next couple of weeks.

Court: So 20 days would be all right so far as you are concerned?

Mr. Erickson: Yes, because I see no possibility of getting at it as far as I am concerned.

Court: Very well, if the plaintiffs will submit a memorandum together with proposed findings of fact and conclusions in 20 days, and how much time would you want?

Mr. Erickson: I would say 15 days.

Court: 15 days then for the defendant to submit his proposed findings and memorandum. I think you are all aware of the two or three propositions that we are going to be really concerned with. There is the proposition in the first instance, I suppose, on the admission of parol evidence, and then, of course, from the factual standpoint itself, there are two or three conditions that probably need some discussion. I might call to your attention the letter, Exhibit "D," particularly, Mr. Erickson, whether that letter fits in with the theory

upon which you have been proceeding. You see, explain that situation to me if it does. It is something in the light of the situation that existed when the defendant testified that he [239] went to the office of counsel for the plaintiffs, and then he went to see his attorney, and then came back and delivered the abstract. Offhand it occurs to me that that is more in keeping with the idea that the abstract was to be delivered prior to the payment, and so I want you to appreciate that those things do appear that way to me, and you had better straighten me out as to what you consider the real significance and meaning of that evidence.

Mr. Erickson: I am sure, your Honor, that the briefs will be plenty long, that the matters will be covered.

Court: That is fine, I don't mind that, the length of your brief in arguing and setting forth your position is fine. Satisfy yourself in the first instance, that is the thing. With reference to the law and the citing of cases, I will appreciate it if you just cite cases that are necessary, just don't cite me a whole list of cases themselves. Then we are faced with the proposition of reading all of those cases. If the point is made by one case, there is no necessity of citing 20, I don't think. However, I appreciate also sometimes cases are not just exactly in point, and sometimes you have to cite a number of cases to show the line of reasoning under those circumstances. I am glad to read all the cases. We try to make it a practice to read every case that is cited, so you will help us by

citing as few cases as possible. Anything further?

Mr. Rimel: Yes. May we have 10 days after defendants file their brief to file a reply brief.

Court: Yes. Very well, our next business is at two o'clock. Court will stand in recess until two o'clock. [241]

[Endorsed]: Filed March 31, 1955.

DEFENDANTS' EXHIBIT No. 1

United States Department of the Interior
Bureau of Reclamation
Bitter Root Project

Amendatory Contract between the United States of
America and the Bitter Root Irrigation Dis-
trict.

This amendatory contract, made this 16th day of September, 1948, under the provision of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto, and particularly the Act of August 4, 1939 (53 Stat. 1187), together hereinafter referred to as the Federal Reclamation Law, between The United States of America, hereinafter referred to as the United States, acting for this purpose through William E. Warne, Assistant Secretary of the Interior, hereinafter referred to as the Secretary, and the Bitter Root Irrigation District, an irrigation district organized under the laws of the State of Montana, and having its principal place of business at Hamilton, Montana, hereinafter referred to as the District,

Defendants' Exhibit No. 1—(Continued)

Witnesseth that:

2. Whereas, the United States and the District entered into a contract dated August 24, 1931 in pursuance of the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto and the Act of Congress of July 3, 1930 (46 Stat. 852), which contract was amended and supplemented by the contract of March 17, 1936 for the purpose of extending to the District the benefits of the [244] Act of Congress of August 26, 1935 (49 Stat. 799), said contracts being hereinafter referred to collectively as the Government-District contract; and

3. Whereas, said Government-District contract provided for (a) liquidating the bonded and other outstanding indebtedness of the District, (b) for the doing or causing to be done under the supervision of the Secretary, of such construction, betterment or repair work as in the opinion of the Secretary may be necessary to place the irrigation works of the project in good operating condition; and (c) for loaning of money to the District from time to time for the prosecution by the District of any construction, betterment or repair work that in the opinion of the Secretary may be needed to place the irrigation works of the project in good operating condition, and (d) for allotment to the District of funds appropriated by the Emergency Relief Appropriation Act of 1935 for use in betterments and repairs of the District's irrigation works; and

4. Whereas, the Government-District contract

Defendants' Exhibit No. 1—(Continued)

provides, among other things, for the repayment of all funds so used or advanced by the United States to the District within a period of forty years from the date of the first disbursement by the United States to or for the benefit of the District, with interest at four per centum (4%) per annum on the funds so used or advanced from the date of such use or advancement until paid, which interest after July 1, 1935, was payable only on funds advanced for liquidating the bonded and other outstanding indebtedness of the District; and [245]

5. Whereas, the District, as the duly authorized representative of the water users involved, desires to enter into an amendatory contract for the purpose of securing the benefits of the Act of August 4, 1939 (53 Stat. 1187); and

6. Whereas, the Secretary has determined that, in his judgment, the provisions of this amendatory contract provide fair and equitable treatment of the repayment problems involved and would be in keeping with the general purpose of the said Act of August 4, 1939;

Now, therefore, in consideration of the mutual and dependent stipulations and covenants herein contained, it is hereby mutually agreed by and between the parties hereto as follows:

Scope of Amendatory Contract

7. This amendatory contract supersedes and takes the place of the contracts between the United States and the District dated August 24, 1931 and March

Defendants' Exhibit No. 1—(Continued)

17, 1936, referred to herein collectively as the Government-District contract, and the Government-District contract shall remain or be effective only to the extent expressly provided in this contract: Provided, That the provisions of the Government-District contract which have been fully executed prior to the date of this contract shall remain unaffected by this contract, except as this contract expressly provides otherwise.

Definitions

8. The term "accrued interest" as hereinafter used in this contract, shall mean all interest which has become due under the [246] Government-District contract but has not been paid to the United States by the District as of the effective date of this contract, including \$43,247.81 merged with and added to the principal in accordance with the Act of August 26, 1935.

The term "unaccrued interest" as hereinafter used in this contract, shall mean all interest provided to be paid by the District to the United States under the Government-District contract, but which has not become due as of the effective date of this contract.

The term "unaccrued balance" as hereinafter used in this amendatory contract in relation to obligations of the District to the United States, means that portion of the principal indebtedness of the District to the United States under the Government-District contract which has not become due

Defendants' Exhibit No. 1—(Continued)
and payable prior to the effective date of this contract, including instalments or parts of instalments of such indebtedness with accrued interest thereon deferred under the Act of May 31, 1939 (53 Stat. 792), as extended.

The term "delinquent balance" as hereinafter used in this amendatory contract, means that portion of the principal indebtedness of the District to the United States which has become due under the Government-District contract but has not been paid to the United States by the District.

The term "irrigation works" means the canal and lateral system, reservoirs and all other structures and property of the District. [247]

Cancellation of Accrued and Unaccrued Interest

9. All obligations of the District to the United States for accrued interest and unaccrued interest are hereby cancelled, subject to the provisions of Article 30 hereof. All penalties due the United States from the District and unpaid on September 30, 1947, are hereby cancelled and waived.

Credit to the District for Payments Made

10. The amount of two hundred forty-five thousand seven hundred twenty-five and 81/100 dollars (\$245,725.81) which has been paid by the District to the United States under the Government-District contract, is hereby credited in full on the District's principal indebtedness thereunder regardless of

Defendants' Exhibit No. 1—(Continued)

whether the payment made was for interest due or for application on the principal indebtedness.

Extension of Payment Period; Time of Payment
and Amount of Annual Instalments

11. The unaccrued balance and delinquent balance of the District's obligation to repay the United States under the provisions of the Government-District contract, plus the sum of \$5,100.00 to cover expenses of the United States to September 30, 1947 in connection with this contract, are agreed to total seven hundred seven thousand fifteen and 24/100 dollars (\$707,015.24) as of September 30, 1947, which amount, reduced by any further payments made by the District to the United States under the Government-District Contract prior to the effective [248] date of this contract, shall be referred to hereinafter as the "contract obligation" and shall be paid by the District to the United States, in successive annual instalments, due and payable on or before July 1 of each year beginning with July 1, 1948, or as soon thereafter as this contract becomes effective. Until said contract obligation is paid in full, each of said annual instalments shall be in an amount determined by increasing or decreasing, pursuant to the provisions of Article 12 hereof, the sums herein set out for the respective year as follows, except the sum due for 1948 which shall not be so increased or decreased and shall be paid in the exact amount of \$16,665.00:

Defendants' Exhibit No. 1—(Continued)

1948	.....	\$16,665.00
1949	.....	16,665.00
1950	.....	16,665.00
1951	.....	16,665.00
1952	.....	16,665.00
1953	.....	16,665.00
1954	.....	16,665.00
1955	.....	16,665.00
1956	.....	16,665.00
1957	.....	16,665.00
1958	.....	16,665.00
1959	.....	16,665.00
1960	.....	16,665.00
1961	.....	16,665.00
1962	.....	16,665.00
1963	.....	16,665.00
1964	.....	16,665.00
1965	.....	16,665.00
1966	.....	16,665.00
1967	.....	16,665.00
1968	.....	16,665.00
1969	.....	16,665.00
1970	.....	16,665.00
1971	.....	16,665.00
1972	.....	16,665.00
1973	.....	16,665.00
1974	.....	16,665.00
1975	.....	16,665.00
1976	.....	16,665.00
1977	.....	16,665.00
1978	.....	16,665.00

Defendants' Exhibit No. 1—(Continued)

1979	.....	16,665.00
1980	.....	16,665.00
1981	.....	16,665.00
1982	.....	16,665.00
1983	.....	16,665.00
1984	.....	16,665.00
1985	.....	16,665.00
1986	.....	16,665.00
1987	.....	16,665.00
1988	.....	16,665.00
1989	.....	16,665.00

and sixteen thousand six hundred sixty-five dollars (\$16,665.00) for each year after the year 1989 until the said contract obligation is paid in full: Provided, That the last of said instalments, that is, the instalment completing the payment of said contract obligation, shall not exceed the sum necessary to make the total of said instalments equal the said contract obligation.

Determination of Annual Instalments

12. Each annual instalment provided in Article 11 hereof (except for 1948) shall be determined by increasing or decreasing the sum set out for the respective year in said article as follows:

(a) The area of irrigable lands within the boundaries of the District is agreed to be 16,655 acres, as described on Exhibit "A" attached hereto and made a part hereof, and for the purpose of this article said lands shall comprise the "project contract unit".

Defendants' Exhibit No. 1—(Continued)

(b) Each calendar year during the term of this contract, the Secretary shall determine or estimate the "annual returns", and shall determine the "normal returns" for the project contract unit and shall determine the "parity ratio" to be applied. "Annual returns" means the amount of the gross crop returns per acre of the area in cultivation within the project contract unit for any calendar year. The "normal returns" shall be determined by taking the weighted average of the "annual returns" of those ten calendar years, of the thirteen-year period covering the calendar year for which said normal returns are being determined and the twelve calendar years preceding it, in which the annual returns for such years are the highest: Provided, that an estimate of annual returns may be used for the year for which the normal returns are being determined. The "parity ratio" shall be determined by dividing the average of the "Index of prices received by farmers" covering "Feed grains and hay" and "Dairy products" by the index of "Prices paid by farmers" covering "Commodities, interest and taxes", using the annual indexes as published by the Bureau of Agricultural Economics of the United States Department of Agriculture for the year for which the normal returns are being determined. If the issuance of such annual indexes is discontinued, the parity ratio shall be discontinued. The District and the water users thereof shall furnish the Secretary with such assistance as he requests, including the submission [251] of preliminary crop re-

Defendants' Exhibit No. 1—(Continued)

ports and estimates for the current year on or before July 1 of each year or such other date fixed by the Secretary, for use in the preparation of the estimates and determinations of annual returns and the determinations of normal returns and of parity ratio provided for in this article, and said estimates and determinations made by him shall be subject to adjustment the following year when the actual annual returns and parity ratio are known, and the said determinations by the Secretary shall be conclusive upon the parties hereto: Provided, however, that no adjustments shall be made unless the excess or deficiency of the actual amount collected amounts to more than ten cents (\$0.10) per acre. Written notice of this further final determination shall be furnished to the District by the Secretary on or before the third Monday of August of each year following the year for which such determinations are applicable and any necessary adjustment shall be added to or subtracted from the amount determined as provided in this article to be payable in the following year.

(c) Each calendar year during the term of this contract, the Secretary shall determine the per cent of the normal returns for said year by which the annual returns for said year exceed or are less than said normal returns. For each one per cent or major fraction of one per cent, there shall be an increase or a decrease, respectively, of two per cent in the sum set out for said years, as [252] provided in Article 11 hereof; and the said sum so deter-

Defendants' Exhibit No. 1—(Continued)

mined shall be further increased or decreased by multiplying it by the parity ratio as determined by the Secretary under subarticle (b) of this article: Provided, that in no event shall the amount of said instalment due for said year be less than fifteen per cent (15%) nor more than two hundred per cent (200%) of the sum set out for said year in Article 11 of this contract: Provided, further, that the last instalment payable by the District under the provisions of Article 11 hereof and this article shall not be in an amount greater than the amount necessary to complete payment of the contract obligation under Article 11 hereof. The Secretary shall notify the District of his determinations under subarticles (b) and (c) hereof on or before the third Monday of August of the calendar year for which such determinations are made. The instalment so computed for any calendar year shall be that payable by the District on or before July 1 of the following year.

(d) If at any time by reason of the operations of this article the contract obligation of the District has been reduced to an amount equal to or less than \$16,665, the unaccrued portion shall be paid on the due date of the next instalment without further adjustment under this article. [253]

Operation and Maintenance of Irrigation Works

13. (a) The District shall continue to operate and maintain the irrigation works under the supervision

Defendants' Exhibit No. 1—(Continued)

of the Secretary. Should the District default in any manner in the performance of this contract and should it fail to correct said default after request in writing by the Secretary so to do, the United States may take charge and control of all or any part of the irrigation works and operate and maintain the same. Such operation and maintenance by the United States shall continue until the Secretary determines that the default of the District has been corrected and the District is again capable of operating and maintaining all or any part of the irrigation works then being operated and maintained by the United States and that all or a part of the irrigation works should be retransferred to the District for operation and maintenance. When such determination is made, written notice thereof, together with the effective date of the retransfer, shall be given to the District; and the District shall accept the operation and maintenance of the portion of the irrigation works thus retransferred on the effective date, and shall thereafter operate and maintain the same to the satisfaction of the Secretary.

(b) During the time any of the irrigation works are operated and maintained by the United States, the cost of such operation and maintenance shall be paid annually in advance by the District to the United States. Such payments shall be on the basis of annual estimates [254] made by the Secretary, these estimates to be on the basis of the fiscal year then used by the District. Said annual estimate,

Defendants' Exhibit No. 1—(Continued)

hereinafter referred to as the operation and maintenance charge notice, shall contain a statement of the estimated cost of operation and maintenance to be incurred by the United States in the following fiscal year. Such operation and maintenance charge notice shall be furnished to the District on or before May 1 of the fiscal year preceding the fiscal year for which the notice is issued. When the United States takes over initially the operation and maintenance of any part of the irrigation works, the Secretary shall give the District immediately:

(1) An operation and maintenance charge notice of the estimated amount of such charge from the time the United States started operating and maintaining said irrigation works to the end of that fiscal year; and

(2) An operation and maintenance charge notice to cover the following fiscal year, where the initial taking over occurs after May 1 in any fiscal year.

(c) The District shall pay the amounts set out in any such operation and maintenance charge notice to be paid by the District on or before the date or dates as may be fixed by the Secretary, and shall without delay levy whatever special assessments or toll charges are necessary to raise the funds for payment of such amounts.

(d) Whenever in the opinion of the Secretary, funds so advanced will be inadequate to operate and maintain the irrigation [255] works being operated by the United States, he may give a supplemental operation and maintenance charge notice at

Defendants' Exhibit No. 1—(Continued)

any time stating therein the amount of the District's share of the additional funds required, and the District shall advance such additional amount on or before the date specified in the supplemental notice. If funds advanced by the District under this article exceed the actual cost of operation and maintenance for such irrigation works for the year for which advanced, the surplus shall be credited on the operation and maintenance charge payment due for the succeeding year or in case there is no such payment due to the United States for the succeeding year, it shall be applied on the next instalment to be paid by the District to the United States under the provisions of this contract.

District to Levy Assessments for all Purposes and
Collect Annual Operation and Maintenance
Charge in Advance—Reserve Fund to be Es-
tablished.

14. (a) The District shall levy each year and collect in advance, either as an assessment, or as a toll charge, amounts at least sufficient to provide funds to pay the annual instalment to become due that year as provided in Article 11 hereof, the annual operation and maintenance costs and all other charges, costs and expenses of the District, including those under Article 15 hereof, increased by any deficit or decreased by any excess for the previous year. Such operation and maintenance charge shall be levied upon each of the 16,665 irrigable acres of

Defendants' Exhibit No. 1—(Continued)

land in the District, whether water is used or not, and said charge shall be due and payable to the [256] District one-half on or before November 30 of the year in which levied and one-half on or before May 31 of the following year. No water shall be delivered by the District to any tract of land in the District during any time that the operation and maintenance charges due and payable thereon are unpaid.

(b) The annual operation and maintenance charge to be collected by the District as provided in subsection (a) above, shall include an annual amount of one thousand five hundred dollars (\$1,500) for the accumulation of and the maintenance of a reserve fund which shall be in the sum of fifteen thousand dollars (\$15,000). Accumulations shall be made in this fund until it is equal in amount to fifteen thousand dollars (\$15,000). Thereafter, further annual charges shall be collected whenever, as of the time the annual operation and maintenance charge is fixed, the fund has been reduced to an amount less than fifteen thousand dollars (\$15,000). Such fund shall be available only to meet the extraordinary and unforeseen costs of operation and maintenance and repair and betterments of the irrigation works which are determined by the Secretary to be costs in excess of the normal operation and maintenance costs of such works. Such fund shall be maintained apart from other of its funds and shall be deposited with such depository or may be invested in such securities as are approved by the Secretary.

Defendants' Exhibit No. 1—(Continued)
Overhead, Inspection and Repair Charges

to be paid by the District

15. (a) On March 1 of each year, from the effective date of this amendatory contract, until the District's contract obligation [257] is paid in full, in each case for the calendar year ending on the preceding December 31, the following costs shall be paid:

(i) A charge to cover that part of the expense incurred by the United States in the operation of the office of the Chief Engineer, Regional Office, field legal offices, and other detached offices of the Bureau of Reclamation, which in the opinion of the Secretary are properly and equitably chargeable to the District.

(ii) The cost of all installations, repairs, or maintenance by the United States of measuring and controlling devices and automatic gages under the provisions of Article 24 hereof.

(iii) The cost of all inspections under the provisions of Article 26 hereof.

(iv) The cost of repairs to the irrigation works made by the United States under the provisions of Article 25 hereof.

(v) The cost of all crop censuses and investigations under the provisions of Article 27 hereof.

(vi) Such other direct costs for special work performed for the benefit of the District or the project by the United States at the direction of the Secretary, and which in the opinion of the Secretary are for the use and benefit of the District.

Defendants' Exhibit No. 1—(Continued)

(b) The first payment under this article shall be due and payable on March 1 of the first full year of operation under this contract and shall cover the preceding calendar year ending December 31, but the determination of costs hereunder shall not include such items of cost that have accrued and for which the District has made other arrangements for payment or satisfaction. The Secretary shall give the District a statement of such costs as soon as the said costs are ascertainable each year.

(c) In the event that due to lack of appropriations by the Congress, there are no funds available with which to do the work herein covered by subparagraphs (i), (ii), (iii), (iv), (v) and (vi) of subarticle (a) of this article and for which the District agrees to pay as herein provided, the District will pay to the United States in advance the estimated costs of such work as determined by the Secretary. In the event that such costs, as determined by the Secretary, are less than the funds advanced, appropriate credit shall be given upon such payments thereafter coming due under this article as the Secretary determines to be proper.

Contract Obligation of the District to be Lien

16. (a) The contract obligation of the District shall be a lien upon all of the lands within the District described on Exhibit "A" attached hereto and made a part hereof and upon the irrigation system of the District: Provided, however, that the United States will amend this contract and release said lien

Defendants' Exhibit No. 1—(Continued)

in the event the laws of Montana are amended to permit this to be done, and are so amended to make the contract [259] obligation a general obligation of the District but preserving the lien of any tax or assessment for the payment of all amounts to be paid to the United States under any contract between an irrigation district and the United States as a first and prior lien on the land against which levied to the same extent and with like force and effect as taxes levied for state and county purposes.

(b) Whenever required so to do by the Secretary, the District shall give the Regional Director, Region I, Bureau of Reclamation, Boise, Idaho, advance notice of the amount of any assessment, toll or other charge intended to be levied. Whenever practicable, such notices shall be given not less than fifteen (15) days prior to the intended levy.

District to Enforce Payment of Amounts Due

17. (a) The District shall cause to be levied and collected all necessary assessments and will use all the power and resources of the District to meet the obligations of the District to make all payments to be made to the United States pursuant to the provisions of this contract in full on or before the same become due, including the taxing power of the District, the power to withhold delivery of water and to foreclose tax liens on lands in the District.

(b) The District Board shall each year make a reasonable estimate of probable delinquencies in collections based upon past experience, and shall

Defendants' Exhibit No. 1—(Continued)

levy assessments, tolls or other charges sufficiently large against lands of the District, to collect and pay to the United States in full the amounts agreed upon in this [260] contract on or before the dates when the same are due, taking into consideration the discount for prompt payment provided by the laws of the State of Montana, and to secure the funds to meet the annual operation and maintenance costs, notwithstanding any individual delinquency which may occur in the payment of District assessments, tolls or other charges.

Refusal to Deliver Water in Case of Default

18. (a) No irrigation water shall be delivered to any lands as to which payments due on account of the District's obligation to pay instalments to the United States under Article 11 hereof are in arrears more than twelve months or as to which advance payments for operation and maintenance charges are in arrears.

(b) The District grants to the United States the right, power and license to enter on any of the irrigation works of the District to shut off water being delivered in violation of this article. In the event that the United States exercises said right, power and license as herein provided, neither the United States, its officers, nor employees shall be liable for any damages resulting directly or indirectly from any such exercise of said right, power and license, and the District shall hold the United

Defendants' Exhibit No. 1—(Continued)

States, its officers and employees harmless from any and all claims of damages.

Interest Upon Delinquent Payments

19. Every instalment or charge required to be paid to the United States under this contract, and which shall remain unpaid after it shall have become due and payable, shall bear interest at [261] the rate of one-half of one per cent ($\frac{1}{2}\%$) per month from the date of delinquency. The District shall impose on delinquencies in the payment of assessments, or taxes or other charges levied by the District to meet its obligations under the contract, such penalties as it is authorized to impose under the laws of the State of Montana.

Delivery of Water

20. The District (and the United States, while it is operating and maintaining the irrigation works) will operate the irrigation works to the end of making available to each irrigable acre of land in the District during each irrigation season that quantity of water to which it is entitled.

Water to be Delivered to Not More Than 160 Acres
in the Ownership of Any One Person

21. Pursuant to the provisions of the Federal Reclamation Law, no part of the irrigation water supply furnished through the irrigation works constructed or reconstructed by the United States for

Defendants' Exhibit No. 1—(Continued)
the District shall be delivered to more than one hundred sixty (160) acres in the ownership of any one person.

Responsibility of District to Perfect and Acquire
Necessary Water Rights and Keep
Them in Good Standing

22. Should any additional water rights be needed to supply an adequate amount of water for irrigation of the 16,665 acres of irrigable land in the District, the same shall be acquired by the District at its expense, and the District shall take such steps as may be deemed necessary by the Secretary to perfect its water rights and to keep the same in good standing. [262]

United States Not Liable for Water Shortage

23. On account of accidents, failure of power supply, drought, inaccuracy in distribution, canal breaks, hostile diversion, prior or superior claims, or other causes, there may occur at times a shortage in the water supply for lands of the District. In no event, however, whatsoever the cause, shall any liability accrue against the United States, or any of its officers, agents or employees, for any damages, direct or indirect, arising from such shortage; nor shall any obligation provided for herein be reduced or deferred because of any such shortage or damages.

Defendants' Exhibit No. 1—(Continued)
Measuring and Gaging Devices to Be Maintained
by District

24. The District shall, at its own cost and expense, install and maintain to the satisfaction of the Secretary, all necessary measuring and controlling devices needed in relation to the operation of the irrigation works and for a proper record of the water supply and a proper regulation of the same. Should the District fail to install and maintain such devices or to maintain a satisfactory rotation system to the satisfaction of the Secretary, the United States may install and maintain the same or any part thereof and the cost and expense incident thereto shall be paid by the District to the United States as provided in Article 15 hereof.

Care, Operation and Maintenance
of Irrigation Works

25. (a) The District shall continue to care for, operate and maintain its irrigation works, and shall keep said works in good repair, and shall operate and maintain the same and deliver water [263] therefrom to lands within the District only in such a manner that the irrigation works of the District will be in good and efficient condition and of sufficient capacity at all times for the diversion and distribution of irrigation water needed to irrigate 16,665 acres of irrigable land, and will care for, operate and maintain its irrigation works in full compliance with the provisions of this contract, the

Defendants' Exhibit No. 1—(Continued)

laws of the United States and the State of Montana, and with the regulations of the Secretary now or hereafter made pursuant to the Federal Reclamation Law and the terms of this contract.

(b) The District shall hold the United States harmless from any claim for damages, injuries or claims of any other nature arising from the operation and maintenance of the said irrigation works by the District.

(c) Should the District fail at any time to repair and maintain any part of its irrigation works which, in the opinion of the Secretary, is in a condition unfit for service, the United States may, after giving the District ten (10) days' notice to do such repair and maintenance work and after its failure to undertake the same within that time, perform the repair and maintenance work which the United States deems necessary and shall be reimbursed by the District for all costs and expenses incident thereto.

Inspection by the United States

26. The Secretary may cause to be made from time to time a reasonable inspection of the irrigation works of the District for the [264] purpose of ascertaining whether the terms of this contract are being carried out by the District. Such inspection shall include examinations of the irrigation works and of the books, records and papers of the District, together with examinations in the proper office of the Bureau of Reclamation of all contracts.

Defendants' Exhibit No. 1—(Continued)

papers, plans, records and programs connected with said irrigation works. The actual costs, as determined by the Secretary, of such inspection shall be charged to the District, which determination of costs shall be conclusive and binding on the District.

Crop Reports and Census

27. (a) The District shall keep an accurate record of all crops raised and agricultural or livestock products produced on land in the District. The District shall furnish the United States on or before December 31 of each year a report on such crops, agricultural and livestock products, the report to be in the form prescribed by the United States.

(b) At such times as the Secretary deems it necessary or desirable, he may cause a crop census to be taken, and an investigation of the per-acre income to be made, of all or any part of the lands in the District, but such census and investigation shall not be taken oftener than once each calendar year. Such a census and investigation shall be for the purpose of checking the crop reports furnished to the United States by the District and of furnishing an independent source of information as to crops produced and crop [265] returns from the lands in the District. In connection with such a census or investigation, the Secretary may require information to be given under oath. The cost of such crop census and investigation shall be paid by the District as provided by Article 15 hereof.

Defendants' Exhibit No. 1—(Continued)

Books, Records and Reports

28. The District shall: (1) install and maintain a modern accounting system, to be acceptable to the Secretary, showing all financial transactions of the District, and furnish such financial statements and reports as may be required from time to time by the Secretary; and (2) keep such other records as the Secretary may request, in the manner and form he may desire, and submit such reports based thereon as he may require from time to time.

Access to Books and Records

29. Subject to applicable Federal laws and regulations, the Secretary of the District or his representative shall have full and free access at all reasonable times to the project accounting records and supporting documents of the Bureau of Reclamation relating to the construction, operation and maintenance of the project and the status of the accounts concerning the District's payments of construction and operation and maintenance charges and any other charge or charges due from the District to the United States, with the right at any time during office hours to make copies thereof. Subject to applicable state laws and regulations, the proper representatives of the United States shall have similar rights with respects to the accounts and records of the District. [266]

Confirmation of Contract

30. The Board of Commissioners shall furnish

Defendants' Exhibit No. 1—(Continued)

the United States with certified copies of all petitions and proceedings taken to authorize the said Board to execute this Contract, as well as certified copies of all proceedings taken in the district court of the state judicial district wherein is located the office of said Board by which the proceedings of the Board and of said District leading up to the making of this contract and the validity of the terms thereof shall be judicially examined, approved and affirmed and this contract, when executed, adjudged to be a lawful, valid and binding obligation of the District. If appeal is taken, certified copies of proceedings on appeal, including the final decree, shall be furnished the United States. If, in the opinion of the Secretary, satisfactory confirmatory decrees are not secured promptly as herein provided, the Secretary by giving notice in writing to the District may terminate negotiations for this contract. In the event of such termination, the Government-District contract shall be deemed as having been continuously in full force and effect, unmodified by this contract, and all sums due the United States under said Government-District contract which have not been paid or have been paid only in part because of the negotiation of this contract shall become immediately due and payable.

District to Employ Manager

31. During the term of this contract, the District will employ, as manager or superintendent, a competent irrigation engineer or [267] manager who

Defendants' Exhibit No. 1—(Continued)

shall have had at least three (3) years' experience as manager or superintendent in the operation of similar works, the selection of such person to be subject to the approval of the Secretary. Upon notice from the Secretary that any manager or superintendent employed by the District is or has become unsatisfactory, the District Board will, as often as such notice is given, promptly terminate the employment of such unsatisfactory manager or superintendent and employ one approved by the Secretary.

Changes in District Organization

32. (a) While this contract is in effect, no change shall be made in the District, either by inclusion or exclusion of lands, by partial or total consolidation or merger with another district, by proceedings to dissolve or otherwise, except with the consent of the Secretary evidenced in writing, and no petitions or requests for any such District changes shall be considered by the District until after the same have been approved by the Secretary. Certified copies of such proceedings for changes in District boundaries shall be furnished to the United States immediately upon completion thereof.

(b) If and when required by the United States, the District will exclude from the boundaries of the District all lands in excess of the said 16,665 acres.

Defendants' Exhibit No. 1—(Continued)

Performance of Work with Contributed Funds

33. (a) Pursuant to the Act of March 4, 1921 (41 Stat. 1367, 1404), the United States, at its option, may perform with funds contributed by the District any construction or maintenance work within the authority of the District but which is not otherwise provided for by this contract. If the United States determines that it will undertake any such work, funds therefor shall be advanced by the District as [268] directed by the Secretary. The advance shall be accompanied by a certified copy of a resolution of the District's Board of Commissioners describing the work to be done and authorizing its performance by the United States with the District's funds.

(b) After completion of any work so undertaken, the United States shall furnish the District with a statement of the cost of the work done. Any unexpended balance of the funds advanced will be refunded to the District or applied as otherwise directed by the District; and the amount by which the cost of such work exceeds the amount of funds advanced therefor shall be paid by the District to the United States as the Secretary may direct.

Secretary the Arbiter—Secretary's Acts, Decisions
and Determinations Conclusive

34. In the event of disputes between the parties hereto arising out of this contract involving questions of fact, and so far as the provisions hereof

Defendants' Exhibit No. 1—(Continued)

require a determination of fact to be made, the Secretary is hereby designated as the arbiter of such questions and as the one required to make such determination of fact; and his decision shall be conclusive and binding on the parties hereto. In all acts, matters and determinations provided in this contract to be done, determined or decided by the Secretary or by the United States, the acts, decisions, findings and determinations by the Secretary shall be final and conclusive and shall be accepted as final and conclusive by all the parties to this contract and by all persons [269] claiming any rights under or by virtue of this contract or in anywise based upon or arising out of this contract or any act or proceeding carried on thereunder.

Rules and Regulations

35. The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make rules and regulations, and to add to and modify them, as may be deemed proper and necessary to carry out the true intent and meaning of the law and of this contract, and to cover any details of the administration or interpretation of the same which are not covered by express provisions of this contract. The District shall observe such rules and regulations.

Representative of Secretary

36. Where this contract provides for action by

Defendants' Exhibit No. 1—(Continued)

the Secretary, said action may be taken for and on behalf of the Secretary by his representative duly authorized in writing by him.

Effective Date of Contract

37. The effective date of this contract shall be the date upon which this contract is executed by the Secretary, or his duly authorized representative, on behalf of the United States of America, after approval by the Congress in accordance with Section 7 of the Reclamation Project Act of 1939. [270]

Notices

38. Any notice, demand or request required or authorized by this contract shall be deemed properly given, except where otherwise herein specifically provided, if mailed, postage prepaid to the Regional Director, Region I, Bureau of Reclamation, P.O. Box 937, Boise, Idaho, on behalf of the United States; and to the Secretary, Bitter Root Irrigation District, Hamilton, Montana, on behalf of the District. The designation of the person to be notified or the address of such person may be changed at any time by similar notice.

Contingent on Appropriations or Allotment
of Funds

39. The expenditure of any money or the performance of any work by the United States herein provided for, which may require appropriations of

Defendants' Exhibit No. 1—(Continued)

money by Congress or the allotment of Federal funds, shall be contingent on such appropriations or allotments being made. The failure of Congress to appropriate funds, or the failure of any allotment of funds, shall not, however, relieve the District from any obligations theretofore accrued under this contract, nor give the District the right to terminate this contract as to any of its executory features. No liability shall accrue against the United States in case such funds are not so appropriated or allotted.

Assignments Prohibited; Successors and
Assigns Obligated

40. The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto, but no assignment [271] or transfer of this contract, or any part thereof or interest therein, shall be valid until approved by the Secretary.

Landowners Acceptance of Benefits
Deemed Consent

41. Every landholder in the District who accepts the benefits of this contract by payment of any assessment at a rate lower than that which would otherwise be in effect against his land, by acceptance and use of water at times when such lands on account of delinquency in payment under the terms of the Government-District contract would not be entitled to the delivery of water under the terms

Defendants' Exhibit No. 1—(Continued)

of that contract had this contract not been made or not been applicable to such land, or by acceptance of any other benefit under this contract, thereby consents to all the provisions of this contract and waives any objections thereto.

Discrimination Against Employees or Applicants
for Employment Prohibited

42. The District shall not discriminate against any employee or applicant for employment because of race, creed, color or national origin, and shall require an identical provision to be included in contracts relating to the performance of this contract. This provision, however, does not refer to, extend to, or cover the activities of the District which are not related to or involved in the performance of this contract. [272]

DEFENDANTS' EXHIBIT No. 2

This Agreement, Made and entered into this twenty-fourth day of April, A.D., 1952, by and between Bernhard Jannsen and Anna Jannsen, husband and wife, of the County of Ravalli and State of Montana, parties of the first part, and Glenn A. Woodbury and Pearl Woodbury, husband and wife, parties of the second part;

Witnesseth, that if the said parties of the second part shall first make the payments and perform the

covenants hereinafter mentioned on their part to be made and performed, the said parties of the first part hereby covenants and agree to convey and assure to the said parties of the second part, in fee simple, clear of all encumbrances whatever, by good and sufficient Deed, the lots, pieces, or parcels of ground situate in the County of Ravalli, and State of Montana, known and described as North half of the Northeast quarter of the Southeast quarter ($N\frac{1}{2}NE\frac{1}{4}SE\frac{1}{4}$) Section Thirty-four (34), Township Ten (10) North, Range Nineteen (19) West; and the West half of the Northwest quarter ($W\frac{1}{2}NW\frac{1}{4}$) and the Northwest quarter of the Southwest quarter ($NW\frac{1}{4}SW\frac{1}{4}$) of Section Thirty-five (35), Township Ten (10) North, Range Nineteen (19) West.

And the said parties of the second part hereby covenants and agree to pay to the said parties of the first part the sum of Twenty-eight thousand and no/100 Dollars (\$28,000.00), payable at the First State Bank, Stevensville, Montana, in the following manner:

The sum of \$8,100.00 at or before the execution of this contract;

The sum of \$16,200.00 to be paid in annual installments of \$1,000.00 per year on or before the first day of November of each year, commencing with November 1, 1953, together with interest at the rate of three per cent (3%) per annum.

The parties of the second part agree to assume that Federal Land Bank mortgage in the amount of \$3,700.00.

The parties of the second part agree to pay all taxes, assessments or impositions legally imposed upon said land from date, and current taxes to be pro-rated as of this date, and in case of the failure of the said parties of the second part to make either of the payments, or interest thereon, or any part thereof or perform any of the covenants on their part hereby made and entered into, then the whole of said payments and interest shall, at the election of said first parties become immediately due and payable, and this contract shall, at the option of the parties of the first part, be forfeited and determined by giving to the said second parties sixty (60) days' notice, in writing, of the intention of the first parties to cancel and determine this contract, setting forth in said notice the amount due upon said contract, and the time and place, when and where payment can be made by said second parties. [274]

Possession shall be delivered to the parties of the second part on the 5th day of June, 1952.

It is mutually understood and agreed by and between the parties to this contract that sixty days is a reasonable and sufficient notice to be given to said second parties, in case of failure to perform any of the covenants on their part hereby made and entered into, and shall be sufficient to cancel all obligations hereunto on the part of the said first parties and fully re-invest them with all right, title and interest hereby agreed to be conveyed, and the parties of the second part shall forfeit all payments made by them on this contract, and their right, title and interest in all buildings, fences or other im-

improvements whatsoever, and such payments and improvements shall be retained by the said parties of the first part, in full satisfaction and as a reasonable rental for the property above described and in liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid.

It is mutually understood and agreed that the parties of the second part will maintain \$4,800.00 insurance upon all buildings on the premises for the duration of this contract.

It is mutually agreed, by and between the parties that for the consideration hereinbefore mentioned, the parties of the first part agree to deliver as a portion of the above described real estate one oil tank and one hot water heater.

It is mutually agreed, by and between the parties hereto, that the time of payment shall be an essential part of this contract; and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

A copy of this contract, together with the deed, shall be placed in escrow at the First State Bank at Stevensville, Montana, with instructions to deliver said deed to the parties of the second part upon satisfactory completion of this contract.

The above bank is instructed to deduct the cost of the escrow and the cost of Internal Revenue stamps from the payments made by the party of the second part and deliver the remainder to the party of the first part. [275]

In Testimony Whereof, both parties have hereunto set their hands and seals the day and year hereinabove written.

/s/ Bernhard Jannsen

/s/ Anna Jannsen

/s/ Glenn Woodbury

/s/ Pearl Woodbury

State of Montana,
County of Ravalli—ss.

On this twenty-fourth day of April, 1952, before me, A Notary Public for the State of Montana, personally appeared Bernhard Jannsen, Anna Jannsen, Glenn A. Woodbury and Pearl Woodbury, to me known to be the persons described in, and who executed the foregoing instrument, and acknowledged that they executed the same.

[Seal] /s/ Frances M. Brown,

Notary Public for the State of Montana, residing
at Stevensville, Montana. [276]

[Endorsed]: No. 14782. United States Court of Appeals for the Ninth Circuit. Glenn Woodbury and Pearl Woodbury, Appellants, vs. Alfred Clermont and Marguerite I. Clermont, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: May 31, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14782

ALFRED I. CLERMONT and MARGUERITE I.
CLERMONT, Plaintiffs,
vs.

GLENN WOODBURY and PEARL WOOD-
BURY, Defendants.

STATEMENT OF POINTS

The appellants herein adopt the Statement of Points and Designation of Record filed in the District Court as the Statement of Points and Desig-

nation of Record in the United States Court of Appeals for the Ninth Circuit in the above entitled cause.

Dated this 6th day of July, 1955.

GLENN WOODBURY and
PEARL WOODBURY,

Appellants

/s/ By LEIF ERICKSON,

Attorney for Appellants

[Endorsed]: Filed July 9, 1955. Paul P. O'Brien,
Clerk.

Brief of Appellants

United States Court of Appeals *for the Ninth Circuit*

No. 14782

GLENN WOODBURY and
PEARL WOODBURY,

Appellants,

vs.

ALFRED CLERMONT and
MARGUERITE I. CLERMONT,

Appellees.

*Upon Appeal from the District Court of the United States
for the District of Montana*

RUSSELL E. SMITH,
W. T. BOONE,
JACK W. RIMEL,
of Missoula, Montana,
Attorneys for Appellees.

LEIF ERICKSON, Helena, Montana,
WILLIAM F. SHALLENBERGER,
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Attorneys for Appellants.

FILED

DEC -5 1955

PAUL E. O'BRIEN, CLERK

STATEMENT OF QUESTIONS PRESENTED

A. Can the appellees rely upon the ambiguity, (of "mortgage" or "contract for deed"), in the earnest money receipt which constituted the agreement between the appellees and the appellants to excuse their non-performance.

B. Does the existence of the lien of the Bitter Root Irrigation District justify the appellees in not going forward with the deal and paying the \$11,000.00 when the lien itself was much less than the \$11,000.00 payment?

C. Is this a proper case for relief from forfeiture under Section 17-102, Revised Codes of Montana, 1947?

D. Even assuming appellants are liable, can they be ordered to pay back \$5,000.00, or \$1,000.00 more than they received from the appellees?

Brief of Appellants

United States Court of Appeals *for the Ninth Circuit*

No. 14782

GLENN WOODBURY and
PEARL WOODBURY,

Appellants,

vs.

ALFRED CLERMONT and
MARGUERITE I. CLERMONT,

Appellees.

*Upon Appeal from the District Court of the United States
for the District of Montana*

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I. STATEMENT OF THE CASE

In this case the appellees are seeking to have returned to them by the appellants a \$5,000.00 down payment made under an earnest money receipt for the sale of real property in Montana. The Judge of the United States District Court for the District of Montana gave judgment (Tr. 38) against the appellants on the basis of finding of fact (Tr. 31) in which the lower court held that the appellants did not live up to the terms of the earnest money receipt which is appellees' Exhibit No. 3, in that the appellants were unable to give in timely manner merchantable title because of (a) a lien in favor of the United States arising out of a contract with the Bitter Root Irrigation District, and (b) legal title to the property, as opposed to equitable title, being vested in Bernhard Jannsen and Anna Jannsen because of which the abstract of title did not show title to be in the appellants.

In addition to the finding of title defects the lower court found that the appellees acted promptly and in good faith and were not guilty of any wilful breach of duty such as would prevent them from having a return of their down payment (Tr. 36 and 37).

In writing this brief we shall take the facts from the evidence offered by the appellees themselves and from the uncontroverted evidence offered by the appellants. The appellees' Exhibit No. 3 (Tr. 260), an earnest money receipt, is an arrangement whereby the appellants Woodbury sold to the appellees Clermont a ranch in the Bitter Root

Valley in Montana for a total purchase price of \$36,000.00, of which the Woodburys were to receive Sixteen Thousand Dollars (\$16,000.00), and the balance was to be paid to Bernhard Jannsen and the Federal Land Bank. Five Thousand Dollars (\$5,000.00) was paid on the date of the agreement, and Eleven Thousand Dollars (\$11,000.00), the balance Woodbury was to receive was to be paid on June 15, 1953. The remainder was to be paid as provided in the instruments containing the terms of the agreement between the Woodburys and Jannsen, and between the Woodburys and the Federal Land Bank. Pearl Woodbury, whose testimony is uncontroverted on the point, said that about two weeks after the deal was made the Clermonts came to their home near Stevensville, Montana, to ask for their \$5,000.00 down payment back, stating on page 215 of the transcript:

"Q. Was there any discussion about the sale?

A. That is the day he wanted to know if I thought my husband would give him his money back."

To the same effect is the testimony of her husband, Glenn Woodbury, he being uncontradicted in his statement on page 95 of the transcript:

"Q. Did you have any conversation with Mrs. Clermont relative to this deal you made?

A. Only that she made the remark they might have made a mistake buying it, but she told her husband that she thought if they decided they

didn't want it, Mr. Hagarty could resell it for them."

Marguerite I. Clermont herself testified on page 193 of the transcript:

"A. . . . we even asked them *if they would be willing to return us all of our money or part of it*, and wait to be sure we had money, as we had received word recently, a few days later, from the Wheat Board stating that it was impossible for them to guarantee delivery of that wheat by the end of May, as they had given us reason to believe before." (Emphasis ours).

It is significant that this was before any abstract whatsoever was delivered. The appellees' Exhibit No. 2 (Tr. 52) constitutes a demand for the abstract and title and is dated June 11, 1953. The earnest money receipt is silent as to when the abstract was to be delivered, the demand for the abstract thus coming after the appellees had sought the return of their money.

Glenn Woodbury testified without contradiction that he got the abstract and took it to the attorney mentioned in the letter of June 11th, to whom the appellant, Glenn Woodbury, was to deliver the same and that he further says (Tr. 104 and Tr. 105):

"A. . . . I told him that there was a matter of about \$11,000 payment that was due that day, and he informed me they weren't going to pay me \$11,000 or any more money on that contract until

they had a chance to examine the abstract. I agreed with him that that was quite all right with me, I didn't expect him to give me any money, but I asked him if he thought it was any more than right that he have the money in his possession when he examined the abstract inasmuch as the payment was due that day, so if the abstract was not right and I was out an expense to make the abstract right, that I had no assurance that the deal was going to be completed."

At the time of delivering the abstract to the appellees' attorney Mr. Woodbury makes the uncontradicted statement as to what took place (Tr. 106):

"A. I just told him I didn't want the money myself, I wanted him to have the money and hold it and if the abstract was okay, deliver it to me, and if it wasn't, *I would make the abstract good, whatever it took, and when I made it good, I wanted the money to be there as an assurance . . .*"
(Emphasis ours).

Woodbury further states that he is willing still to go through with the transaction and that he still owns the property and is willing to apply the \$5,000.00 down payment in dispute on the purchase price (Tr. 108), and willing to pay off the asserted title defects.

It is to be noted that the appellees' Exhibit 3, being the earnest money receipt, provided that "the real property is

to be conveyed by contract for deed . . ." the words "contract for deed" are written in in ink.

It is the appellees' contention that in this \$36,000.00 sale the contract for deed applied to a mere \$200.00 differential which under one construction of the contract might have been due to the Woodburys in addition to the \$16,000.00 equity that they have in the property (Tr. 82 and Tr. 83). It is the appellants' contention that this phrase in the contract for deed meant simply that the Woodburys were to assign and give over to the Clermonts the contract for deed which they had with Jannsens, notwithstanding that the Jannsen arrangement is referred to as a mortgage in other portions and parts of the appellees' Exhibit 3. Parol evidence was admitted to shed light on this ambiguity and the appellee Marguerite Clermont testifies herself on page 192 of the transcript that she knew that Jannsen had a deed to the property and not Woodbury, she stating in these words:

"Q. Who was going to have the deed to the property?

A. *We figured it would be Mr. Jannsen.*"

(Emphasis ours).

Alfred Clermont himself refers to this Woodbury-Jannsen arrangement as an agreement, using these words and answers on page 207 of the transcript:

"Q. (By Mr. Erickson): Mr. Clermont, did Mr. Hagarty discuss with you at the (221) first

time you met the terms of the agreement between Jannsen and Woodbury?

A. Well, yes, the terms to pay this—

Q. Jannsen?

A. \$1,000 a year.

Q. And did he say what the interest was?

A. At three percent."

The \$11,000 payment which was due June 15th and never paid was to come from the proceeds of the sale of Canadian wheat belonging to the appellees, and the simple fact of the matter is that this money was not received until July 29th under the testimony of the appellee Marguerite Clermont on page 200 of the transcript.

It is to be noted that the \$5,000.00 down payment in dispute was not made entirely to the appellants but this payment was made in two checks, \$1,000.00 to the real estate agent, Pat Hagarty, who is not a party to this suit (Tr. 66).

II. ASSIGNMENTS OF ERROR

1. The Court erred in refusing to dismiss the complaint for failure to state a claim upon which relief can be granted;

2. The Court erred in entering judgment for the appellees;

3. The Court erred in refusing to dismiss the complaint for the reason that neither by the complaint nor the reply

did the appellees allege themselves to be ready, willing and able to perform under their contract nor did they allege tender;

4. The Court erred in entering judgment for the appellees for the reasons that:

- (1) Appellees did not prove they were ready, willing or able to perform under the contract, nor did they prove tender;
- (2) The appellees were in default under their contract and appellants were not since appellants could only be placed in default by tender on the part of the appellees or an offer to perform;
- (3) Appellants were not required to show marketable title until there had been tender of performance by the appellees;
- (4) The Court, in making its findings of fact disregarded (281) the parol evidence explaining the imperfections and ambiguities in the contract;
- (5) The appellants were only required to have good title at the time set for conveyance of the lands involved;
- (6) The testimony shows without question that the appellees knew, understood and agreed that the Jannsen contract was a contract for deed and

not a mortgage, and they expressly agreed to assume the contract;

(7) The appellees were fully informed and were put on notice of the existence of the lien for irrigation charges. If they were not, under the terms of the contract, their lien of the irrigation construction charges could have been paid out of the purchase money;

(8) The evidence established that appellants had suffered damage by reason of the failure of the appellees to carry out their contract in excess of the down payment.

III. ARGUMENT AND AUTHORITIES

It is the contention of the appellants that a negative answer must be given to all of the above four questions and particularly that the appellees cannot rely upon their claimed right to buy the property subject to a mortgage instead of taking an assignment of a contract for deed where they bought the property without knowing but what the terms of the contract for deed were more favorable in every respect than a mortgage. And the lien of the Bitter Root Irrigation District being approximately \$4,500.00 and less than the amount of the next payment due, \$11,000.00, could have been paid by the appellees themselves under the express terms of the contract. And that by reason of these facts it is not a proper case for a relief from for-

feiture, but instead is a case of wilful attempt to evade the contract.

A. Ambiguity of "mortgage" or "contract for deed" does not excuse non-performance.

As we see it and as we will point out, it is clear, on the face of the earnest money contract the Clermonts were buying Woodbury's equity and assuming the obligations under the Jannsen contract for deed and the Federal Land Bank mortgage. The contract sets out the terms of the Jannsen contract. The Clermonts agreed to make the annual payments and interest provided in that contract, they were offered an opportunity to examine it, and *Mrs. Clermont on the stand said that she understood that after they had paid off the Woodburys, the legal title would be in Jannsen*, showing that she was under no misapprehension as to legal effect of the contract between Woodbury and Jannsen. And while it is true that in other portions of their testimony this appellee insisted strongly that the Jannsen-Woodbury arrangement was promised to them as a mortgage, still it is true that she does admit that she knew Jannsen was to have title after Woodburys' equity was brought out by herself and her husband. Where a party's testimony contains conflict, he is not entitled to judgment unless the portion least favorable to him authorizes the judgment.

Thus, in the case of *Morton v. Mooney*, 33 *Pac.* (2d) 262, 97 *Mont.* 1, this court held on pages 12 and 13:

"... 'if a person testify in his own behalf, and there are material conflicts and contradictions in his testimony, he is not entitled to recover if he be the plaintiff, unless that portion of his testimony which is least favorable to his contention is of such a character as to authorize a recovery in his behalf'. While plaintiff's testimony contains statements which may be said to render his version of the accident more credible than certain of those quoted above, under the last-quoted rule, those statements are to be disregarded. 'It cannot be unfair to this plaintiff to deal with his case from the standpoint of his own statements'."

In the case of *Putnam v. Putnam*, 282 Pac. 833, 86 Mont. 135, the court held on page 143:

" 'It cannot be unfair to this plaintiff to deal with his case from the standpoint of his own statements' . . . 'If a person testify in his own behalf, and there are material conflicts and contradictions in his testimony, he is not entitled to recover if he be the plaintiff, unless that portion of his testimony which is least favorable to his contention is of such a character as to authorize a recovery in his behalf'." (Emphasis ours).

B. The existence of lien of irrigation district does not excuse non-performance.

One of the objections of the purchaser to the marketability of the title was the lien of the irrigation construction charges. A witness testified that the lien of these charges secures an obligation of approximately \$4,500.00 (Tr. 48). There is testimony that the purchasers inquired

at length about the source of the irrigation water. The witnesses agree that the purchasers were told what the annual water charge would be. There is nothing to remotely suggest in this record or in the conduct of the sellers as revealed by the record, any intent on the part of the sellers to conceal any material facts from these purchasers. They offered to show the purchasers the Jannsen contract and they told the purchasers where to get full information on the water charges.

Appellants have pleaded waiver on the part of the buyers of a right to object to the marketability of the title on the title on the basis of the lien of the irrigation charge, by their express agreement to assume the water payments. We submit that the facts bring this case within the authority cited in 57 A.L.R. 1396.

While there was no reference to the lien of the irrigation charges as such, there was an agreement to pay the water charges, beginning with the year 1953. *The payment of the water charges would, of course, operate eventually to discharge the lien.* The testimony, which was not controverted, is that Clermont asked if eventually part of the water charge would be paid off (Tr. 87). He was told in reply that Woodbury understood that sometime the debt would be paid off on the water, but he couldn't say whether it would be in his lifetime or Clermont's (Tr. 87).

But, if the Court should determine that under all of the facts, the buyers may say that the lien of the irrigation

construction charges is a defect in the title rendering it unmarketable, their remedy is set out in Paragraph III of the contract, which is appellees' exhibit number three, the applicable language being:

"Encumbrances to be discharged by a seller, may at his option be paid out of the purchase money at the date of closing."

It is pretty hard to tell from this agreement what the date of closing is, but it apparently would be the date on which the contract for deed provided for in Paragraph 2 is assigned. It may be assumed that it was contemplated that the contract for deed be assigned on or before June 15, the date upon which the balance that Woodbury himself would receive of Eleven Thousand Dollars (\$11,000.00) was paid. That balance of Eleven Thousand Dollars (\$11,000.00) exceeds the amount of the irrigation construction lien. The buyer, therefore, had full power to discharge the lien by payment of it out of the balance of Eleven Thousand Dollars (\$11,000.00) due.

Under Paragraph 4, it is obvious that the provision as to merchantability is not an arbitrary provision, for the seller is given an opportunity to make it merchantable within a reasonable time. The buyers here have the ability to see that the irrigation construction lien is discharged out of the Eleven Thousand Dollars (\$11,000.00) owing Woodbury, and they may not nullify the contract which they entered into with the sellers, both sides acting in good

faith, by setting up this lien, as it is said by the Montana Court in the case of *Clifton v. Willson*, 47 Mont. 305, 132 Pac. 424:

"It is the policy of the law to compel parties to live up to their agreements and not encourage them in their violation."

In the case of *Witherow v. Witherow*, 16 Ohio 238, the Court, in discussing a case similar to the Clifton case and speaking of the requirement of pleadings and proof to avoid forfeiture, said:

"It is the duty of Courts to enforce the performance of contract, not to encourage their violation."

Since the method for the discharge of any existing encumbrance is set out in specific language in the contract, and since the amount remaining unpaid is sufficient to discharge the obligation, we sincerely believe a holding that the lien of the construction charge, (if the Court holds that is a defect in the title under this agreement), is sufficient to relieve the buyers of their obligations under the contract would be contrary to the principle stated above that it is the duty of the Court to enforce the performance of a contract and not to encourage its violation.

The rule is stated in 55 *Am. Jur. Pru.* 685, that:

"... the existence of an encumbrance which may be removed or discharged by application of the purchase money, is not considered such a defect as to render the title unmarketable, and excuse the pur-

chaser from the performance of his contract. If an encumbrance can be removed by the application of the purchase money so that a clear title can be conveyed to the vendee, the mere facts that the vendor has not removed it or is unable to remove it without the application of the purchase money, will not excuse the vendee."

In 3 *American Law of Property* 135, a work published in 1952 and a standard text in the subject, the author says unpaid liens of various sorts specified:

"... will render the title defective unless the lien may be paid off by means of the unpaid purchase price money."

A case quite similar to the one before the Court is *Sparks v. Helmer, Okla.* 286 *Pac.* 306. The contract there:

"Provided that defendants were to furnish an abstract of title showing marketable title, the same to be approved by an attorney selected by the plaintiff."

In holding that the buyer could not relieve himself of his obligation under the contract to buy by reason of the existence of an encumbrance in an amount which would permit its discharge by application of a part of the purchase price, the Court said:

"It is argued by plaintiff that defendants breached the contract by failing to pay off and discharge the mortgages held by the mortgage company. On this proposition the evidence is conclusive that the defendants were willing to permit a part of the purchase

price to be used to take up these mortgages. It also appears that arrangements could readily have been made to procure the releases in this manner. The purchase price of the land under the contract was in excess of the amount due on these mortgages. Plaintiff could in no wise been injured by permitting this to be done. The trial court held this a substantial compliance with the contract on the part of defendants. With this holding we agree."

In this case there is specific provision in the agreement permitting the discharge of the lien out of moneys owing on the closing date. This provision was in existence at the time the buyers made their objection to the title.

We respectfully submit that if the right to object to the lien of the construction charges was not waived by the buyers, the Clermonts, they are limited to the relief provided in the contract. They may not either rescind the contract or procure the return of the earnest money under the First Count, so long as the balance owing Woodbury exceeded the amount required to discharge the lien.

C. Appellants need not have made their title marketable until the \$11,000.00 payment was made.

The rule is that where the vendor agrees to furnish a marketable title in the absence of an express stipulation to the contrary, he need only have marketable title at the date of the conveyance of the property. Counsel for appellees in their brief to the lower court have said the provision, in this Receipt and Agreement to Sell and Purchase,

that the conveyance to the Clermonts is to be by contract for deed is nonsensical, but there is no dispute in the testimony that the agreement between the Woodburys and the Clermonts was to be finalized through the ordinary contract for deed. In the case of a contract for deed, their obligation to furnish a marketable title would be satisfied if the seller had such a marketable title on the date the actual conveyance by deed was made to the buyers. For example, it is stated in 57 *A.L.R.* 1514:

"... it has been held that in the absence of stipulations to the contrary, the contract to convey land has reference to the condition of the title at the time fixed for the execution of the deed and not at the time of the execution of the contract . . ."

The rule is also stated in 55 *Am. Pru.* 717:

"The general rule is that although the title of one who enters into an executory contract for the conveyance of land may be defective at the time he enters into such contract, if the vendor is able to convey a good title when the time for the conveyance of the land arrives, it is sufficient."

The rule applies even where the vendor has merely the equitable title. 55 *Am. Jur.* 724:

The question is exhaustively annotated in 109 *A.L.R.* 242, where the rule is stated at 251:

"The circumstances that the vendor is only the equitable owner of the premises contracted for does not, prior to the time set for conveyance, entitle the vendee to rescind or suspend payments."

There is language, certainly, in the agreement that indicates that the vendors must have marketable title prior to the time for the actual conveyance, or at a time earlier than the time for actual conveyance. There is an inference that the abstract be furnished prior to the time the Clermonts did anything further in the way of paying for the property, but we respectfully submit the inference to be not a strong one and we respectfully submit there are other inferences to be drawn from the language of the contract which support the position taken by Woodbury that the title did not have to be marketable until the time for actual conveyance, or when the \$11,000.00 would have been paid.

For example, Paragraph I fixes no time for delivery of the abstract. It says the abstract shall be continued "to a date subsequent hereto." Nothing is said as to time of delivery, particularly with relation to the making of the second payment. As in the authorities cited above, the real question in every case insofar as the purchaser is concerned, is whether, when he completes his payments, he will have good title, and that is the reason that under the ordinary rules, the obligation of the seller is satisfied if he can provide a merchantable title at the time of the conveyance.

The testimony here is uncontroverted that the Clermonts were not to get the deed to the property until the Jannsen obligation was paid off. Mrs. Clermont clearly understood

this from her own testimony. As pointed out above, she said on the stand that after paying off Woodburys, the title would be in Jannsen (Tr. 192). Under this contract and agreement, the Clermonts assumed to pay the Jannsen obligation and obviously on the date of the actual conveyance the Jannsen obligation, no matter what its form, could not be a title defect.

The primary object of the agreement is contained in Paragraph II. What the purchaser sought and what the sellers agreed to give eventually was a conveyance free and clear of all encumbrances, with the exceptions noted in Paragraph II. The buyers here have seized on the abstract feature of the agreement in an attempt to relieve themselves of their obligations under the contract. The title that was furnished, so far as the Jannsen obligation is concerned, complied with the purpose of the contract. The irrigation charge will be discussed later. We respectfully submit that in the light of Paragraph No. II of the contract, the failure to set a date for the delivery of the abstract and the general purposes of the contract, the ordinary rule applies, and that is that there was no obligation on the part of the seller to furnish proof of marketable title until the time came for the actual conveyance.

There is no showing that the seller could not have given good title when the time for conveyance of the actual title came. Woodbury testified directly that even as to the irri-

gation lien, he could discharge it prior to the time of conveyance.

D. The appellees were never ready, willing and able to perform.

The appellees were in a position of having regretted their bargain and wilfully set out to defeat it.

Prior to June 15, the appellees had repeatedly told the appellants that they were not able to pay the Eleven Thousand Dollars (\$11,000.00) due on June 15. On the stand, the appellee, Marguerite I. Clermont, stated that they could have borrowed enough money to make the payment on June 15, but at the same time, she stated, as did her husband, that they had never, in any manner, indicated to the defendants that they were ready, willing or able to perform had they been satisfied with the abstract.

There is no allegation in either the complaint or the reply that the appellees were either ready, willing or able to perform, or any allegation of a tender on their part. The court now has before it not only the pleadings which fail to allege tender or ability to perform on the part of the appellees, but also affirmative proof that there was no tender nor was there anything said or done to indicate to the appellants that the appellees would perform if the abstract proved satisfactory, or if defects, if any, were cured.

With the testimony, as well as the pleadings before the Court, we respectfully submit that the appellees have no

standing before the Court. If we grant that the furnishing of an abstract, showing marketable title was due on or before June 15, 1953, there still is no question but that by express unequivocal language of the receipt and agreement to sell, the appellees were required to be ready, willing and able to perform on June 15, 1953. Under the most favorable view to the plaintiff and under every decision that we have been able to find, tender or an offer to perform was an obligation that came into existence on June 15, 1953, on the part of the appellees. The appellees may not put the appellants in default until the tender or offer to perform is made. As will be pointed out later, the instrument entitled Receipt and Agreement to Sell and Purchase is an incomplete document obviously intended only as a binder, and in many respects, ambiguous, however the date that the balance was to be paid to Woodbury is clearly and unequivocally fixed as June 15, 1953.

The provision for the furnishing of the abstract showing marketable title is for the benefit of the appellees, and there is no obligation on the part of the appellants to furnish any abstract until demanded by the appellees. Before any obligation devolved upon the appellants under Paragraph No. 4, there had to be a written notice on the part of the appellees containing a statement of defects. This notice was not furnished until after the 15th day of June, the notice being "Exhibit B" and bearing date June 22, 1953.

We believe, at the very least, that tender, or at least an allegation of an ability and willingness to perform on June 15 is essential before the appellants can be put in default. We again urge that *Section 58-209, Revised Codes of Montana, 1947*, in the light of the pleadings and evidence applies:

"Before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself; and must be able to fulfill and offer all conditions concurrent so imposed upon him on the like fulfillment by the other parties except as provided by the next section."

The next section referred to is *Section 58-210* which excuses performance only where one party to an obligation gives notice to another before the latter is in default, that he will not perform the same upon his part, the section reading in full:

"If a party to an obligation gives notice to another, before the latter is in default, that he will not perform the same upon his part, and does not retract such notice before the time at which performance upon his part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions upon his part in favor of the former."

In addition to the general rules stated in our brief on the motion to dismiss, the Court' attention is called to the rule

as it is stated in 1 *Bancroft's Practice and Remedies* 351. the author there says:

"In order that a party to a contract consisting of mutually dependent covenants or obligations may maintain an action thereon, he must ordinarily place the other party in default by performance or a tender or offer of performance on his part unless such offer or tender is excused or waived, . . . Usually a formal unconditional tender is not necessary where the stipulations of the parties are to be performed concurrently, but a party to such a contract who is ready, able and willing to perform at the proper time, and so notifies the other party, has done all that he is required to do until the other party is also ready and willing to perform."

This statement is hornbook law and it applies whether the action is one under the contract or an action for rescission. While a literal reading of the language of the document imposes an absolute obligation on the appellees to pay the Eleven Thousand Dollars (\$11,000.00) on June 15 under any view of the transaction, payment of that balance and the delivery of the abstract showing marketable title within the agreement of the parties were to be performed concurrently. Neither on the 15th nor on the 18th of June, nor at any other time were the appellees ready, able and willing to perform their part of the contract, nor did they at any time give notice to the appellants that they were ready, willing and able to perform upon the performance by the appellants of their obligation.

The Courts have gone a long way to excuse actual tender. An example of that liberality is found in the case of *Sherwin v. Baxter*, (*Kan.*) 121 *Pac.* 1128. The case seems to be all fours on the one now before the Court. There no abstract at all was furnished and the suit was to recover back the earnest money. No tender was made, but the purchaser offered to perform when the abstract was furnished. The payment was to be made on January 1. The salient facts are pointed out by the Court as follows:

"On January 1, the appellant (purchaser) again asked the agent for the abstract and was told that he did not have it. On that day, and on January 2, the appellant (purchaser) was ready, willing and able to complete the contract on his part. He had the Eight Hundred Dollars to be paid, part of it in his pocket, a money order for a part, and a part in the bank. He said to the agent that he had the money and was ready to carry out his part of the contract, but made no formal tender of the cash, or of a note and mortgage executed by himself and wife . . ."

In disposing of an argument that a formal tender had to be made, the Court, after citing a number of cases, said:

"In this case, the appellant (purchaser) was not bound to part with his money until the abstract was at least presented for his examination, which was never done. An offer to perform, made in good faith by a party ready and able to do so, is all that ought to be required in such a situation, whether the action be for a specific performance or for recovery of money

advanced. Having made such an offer in the circumstances stated, and requested an abstract for title according to the agreement, which was not presented then or afterwards, the appellee (sellers) were in default."

The conduct of the purchasers here falls far short of the minimum requirements as established in the Sherwin case.

We believe there can be no question that the promises of the seller and buyer here are concurrent or dependent. The rule is to construe mutual promises as concurrent or dependent unless the intention that the promises be independent, is expressly stated.

The general rule is stated thus in *Stockstill v. Baird*, 132 La. 404, 61 Southern 446, as follows:

"The courts at the present day incline strongly against the construction of promises as independent; and, in the absence of clear language to the contrary, promises which form the consideration for each other will be held to be concurrent or dependent, and not independent, so that a failure of one party to perform will discharge the other, and so that one cannot maintain an action against the other without showing the performance or tender of performance on his part."

Under this contract, the obligation of the purchaser to tender or to offer to perform was June 15. The sellers had at least until that time in which to furnish the abstract showing marketable title, and in view of the conduct of

the buyers in failing to demand the abstract earlier, certainly the obligation did not exist on the part of the sellers to furnish the abstract and to show marketable title before that date.

In 55 *Am. Jur. Pru.* 975, the applicable rule is stated:

"As a general rule, a party who asks for the rescission must himself be without fault, and when the payment of the purchase money and the making or tender of the deed are to occur simultaneously, they are regarded as mutual and concurrent acts disabling either party from putting an end to the contract without performance or a valid offer to perform on his part, and so far as the question of time is concerned, both parties, after the day provided for the consummation may be considered equally in default, and neither can hold himself discharged from the obligation of complete performance until he has tendered performance on his own side and demanded it on the other."

Under Section 7 of the Receipt and Agreement, time is made the essence of the agreement. There is much ambiguity in the contract, but the provision for the payment of the balance to the sellers on June 15, 1953, is clear and explicit. In 8 *Thompson on Real Property* 493, the author says, in considering contracts to buy and sell real property:

"A provision that time shall be of the essence of a contract to sell land is for the benefit of the vendor."

In 3 *American Law of Property*, 148, in discussing contracts of the type before the Court, the author says:

"Where time is of the essence of the contract, the tender in demand must be made on the day named."

The day named here was June 15. This rule applied literally, would have terminated the contract so far as the appellees are concerned on that date. Here we have a case where the appellees not only failed to make tender or any offer to perform on the day named, but have never made such a tender or offer to perform upon compliance by the sellers with their agreement.

In discussing the right of the buyer to recover earnest money or down payment, it is said in 8 *Thompson on Real Property* 605:

"Refusal or inability to perform the contract by the vendor will entitle a purchaser *who is not himself in default* to disaffirm the contract and recover the purchase price paid." (Emphasis ours).

Further, the author says at page 609:

"In order to sustain the action, the purchaser need only show that *he is ready, willing and able to perform* his part of the contract." (Emphasis ours).

While the contract is unclear as to the time in which the abstract is to be presented, there is no doubt but the buyers agreed to be in a position to perform on June 15, 1953. They have not alleged they were in such a position. All the appellants knew, until the date of the hearing of

this case before the Court, when Mrs. Clermont said that on June 15 they would have been able to have made the payment by borrowing from a friend was that the appellees were unable to perform their part of the agreement, and under all the cases, the right of the appellees to here recover depends upon their own willingness and ability to perform on the performance date, June 15, 1953. We believe that what is said in 3 *American Law of Property* 116 exactly covers the situation here involved:

"Performance by one party or a tender of performance is a prerequisite to his demand for performance by the other. The only time when his own performance is not a condition precedent to compelling the other party to perform is when it is excused by a refusal of the other party to carry out his obligation. The rule that the obligations are dependent covenants applies, of course, not only to formal sales contract, but also to options which by acceptance have become contracts. Where the promises call for a concurrent act of performance, neither is in default; the contract remains in force but inactive, and either party is in position to perform or tender performance and demand fulfillment of the obligations of the other at any time before they are barred by the statute of limitations."

See, also, *Townsend v. Tufts*, (Cal.) 30 Pac. 528.

There are cases without number on this general proposition of the requirement of a tender or an offer to perform, but this brief will not be burdened with further citations.

We respectfully urge that whether the action is considered one in the nature of rescission or one under the contract the mutual obligations of the parties is still subsisting and will continue to subsist until the appellees make an offer to perform and the appellants fail to perform or until the appellants perform, which we believe they have, and the appellees fail to perform.

This is true not only because the vast weight of authority, but because as a practical matter, there would be no logic in requiring the appellants to cure a defect if it did exist unless they have some assurance that the appellees would perform when the defects were cured. In this case, as we will point out later, if there is a defect in this title that makes it unmarketable, it is the lien of the irrigation charges. A witness on the stand testified that the amount of that lien was approximately Forty Dollars (\$40.00) an acre (Tr. 48). As the abstract will show, the indebtedness is one held by the United States Government under the Reclamation Act, and the construction charge carries no interest. Appellant, Glenn Woodbury, testified that he could raise the money to discharge that lien if it was a defect within the agreement of the parties without being certain that the appellees would perform after the defect was removed, but he would lose the advantage of not having to pay interest if he did so and he wouldn't do it. That is the reason, of course, that he stated to counsel for appellees when he presented the abstract that he wasn't

going to do anything until he knew that the appellees were ready, willing and able to perform. He never received that assurance and has not received it to this date. The same thing is true of the contract for deed with Jannsen. That contract for deed as shown by the Receipt and Agreement and by the testimony of the parties, bears interest at the rate of three per cent (3%). Woodbury could raise the money to pay the obligation, but in doing so, he would lose the advantage of a three percent (3%) rate. Without the requirement of the law that the purchasers tender or offer to perform, the appellants would lose the advantage of this favorable contract as a pure gamble that the appellees would go through with their deal.

Appellees' brief cites cases which we believe do not support their contention as to tender or offer to perform. In the case of *State ex rel. E. C. Clark and Evan Owens v. District Court of the Tenth Judicial District*, 11 *State Reporter* 559, some of the language of the contract is the same as in the present case, but there is one vital difference which makes the case inapplicable to the one before the Court. In this case, the purchasers agreed to make a payment on June 15. They had an absolute obligation to make the payment on that date or to offer to perform on condition that the sellers perform. In the case cited by counsel the language reads:

"The \$15,000.00 earnest money held in escrow to be turned to R. B. Fraser *as soon as he shows good title to the land.*" (Emphasis ours).

Showing of good title was clearly a condition precedent in that case, and the obligation of the buyer might or might not arise. Further in the case, the statutes on attachment were being considered. The obligation under those statutes must be unconditional. We do not argue that the purchasers were unconditionally required to pay the Eleven Thousand Dollars (\$11,000.00) on June 15, although the language of the contract might be construed to reach that result, but we do say that they had an obligation on that date to offer to perform on condition that the appellants performed.

In the case of *Bozdech v. Montana Ranches Company*, 67 Mont. 366, cited by counsel, the Court recites at page 374:

"Full performance on the part of the appellees (purchasers) including tender of the final payment according to the terms of the contract, is likewise pleaded."

Further, the Court recites:

"The appellees (purchasers) aver that they have at all times been ready, able and willing to duly do, keep and perform all things by them to be done, kept and performed under the terms of the said contract and agreement, etc."

The Court found that the evidence supported this pleading. The argument was over whether or not the tender of performance had to be unconditional. The case is clearly one that comes within the exception to the requirement of offer to perform or tender where the vendor has made it impossible for himself to perform, and the tender or offer to perform would be an idle act, and that is the holding of the Court. The holding does not fit the facts before this Court.

The principal case relied upon by the Montana Court in the Bozdech case, is *Sutthoff v. Maruca*, 57 *Wash.* 102, 106 *Pac.* 632. In that case, the Court recognizes the general rule that tender or offer to perform must be made. The Court held that tender was not necessary on the date fixed for performance solely on the grounds that the purchasers had:

“ . . . elected to and did rescind.”

The Court then discusses a number of cases, all of them to the same effect, that where the vendor is obligated to convey on a day certain, if the purchaser chooses to rescind, no tender on his part is necessary, but the cases are specifically limited to those where the purchaser has by notice elected to rescind. Here, under counsel's theory, the purchasers have not elected to rescind, but are suing, as counsel puts it, to enforce the provisions of the living contract.

The Bozdech case is one for rescission, and there was an election to rescind.

In the case of *Silvast v. Asplund*, 93 Mont. 584, the vendor, without tendering performance on his part, sought to declare a forfeiture of payments made by the vendee, and the Court held, as we here contend, that one party to the contract may not, without performing or tendering to performance himself, declare the contract rescinded by reason of the failure of the other party to perform.

We urge that the decision in *Thorpe v. Rutherford*, 150 Ore. 43 Pac. (2d) 907, has exact application, and we take the liberty of quoting again from that decision:

"A vendee who has not performed or tendered for performance on his part, cannot rescind and recover back what he has paid because of the vendor's failure to furnish an abstract showing marketable title."

E. Earnest money receipt should be reformed to change Jannsen arrangement from mortgage to contract for deed.

Parol evidence is admissible under the terms of *Subsection 1 of Section 93-401-13, Revised Codes of Montana, 1947*. Under that subsection, parol evidence is admissible:

"Where a mistake or imperfection of the writing is put in issue by the pleadings."

Appellants have here pleaded mistake. See, also, *Read v. Lewis and Clark County*, 55 Mont. 412, 418, 178 Pac. 177;

Dobson v. Pearce, 12 N.Y. 156, 62 *American Decisions*, 152; *Parrish v. Rosebud Mining Company*, 140 Cal. 635, 71 Pac. 694, (*Affirmed*) 74 Pac. 312. By the answer and cross-complaint, appellants specifically alleged that the designation of the Jannsen obligation as a mortgage was a mistake and the testimony of Mrs. Clermont, wherein she specifically stated that it was her understanding that after the balance had been paid by the Clermonts to Woodbury, the legal title would be in Jannsen, proves the allegation.

This ambiguity could be cleared up by parol evidence and the proper modification in the earnest money receipt ordered by the Court. The authorities here are too numerous to discuss in detail, but in the case of *Butler Bros. Development Company v. Butler*, 111 Mont. 329, 347, 109 Pac. (2d) 1051, it is stated:

“Appellant argues that when a contract is ambiguous, parol evidence of the circumstances leading up to its execution is admissible to explain its purpose. There can be no doubt concerning the correctness of this abstract principal of law.”

F. The facts do not make this a proper case for relief from forfeiture.

The facts here do not show that the appellees are entitled to relief from their forfeiture. Their forfeiture was wilful. The appellants were at all times ready to go through with the contract even down to the time of trial. Appellees seek to evade the contract purely by claiming

that the written agreement mentions the word "mortgage," and it turned out to be a contract for deed, and they are unwilling to go forward with the transaction. Although the contract is eminently fair on its face, and although there is an abundance of evidence that they knew it was a contract for deed, and the earnest money receipt itself shows that they were willing to take an assignment of contract for deed according to its language in another paragraph, still appellees insist that they wanted and expected to buy the property subject to a mortgage and not a contract for deed. The value of property has gone down according to the uncontradicted testimony and the appellants have suffered damages by reason of this.

Further, this is not a proper case because it does not have the earmarks of a situation where the sellers are immediately able to resell the property for as much or more than they sold it for to the persons seeking to evade the rule against forfeiture.

In the case of *Donald v. Arnold (Mont.)* 138 Pac. 775, at page 776, it is held:

"... that the rule against forfeitures, so far as this state is concerned, is expressed in Section 6039 of our Codes, and a party seeking its benefit must by his pleading and proof bring himself within it. It is not enough to say on appeal that a loss in the nature of a forfeiture may be incurred by enforcing the terms of a contract which the parties themselves have made; but, to secure the protection of Section 6039, it must be

invoked, and 'the very minimum requirement is that the party invoking the protection afforded by that section must set forth facts which will appeal to the conscience of a court of equity'. *Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700. A concrete application of these rules illustrating some circumstances authorizing relief from a loss in the nature of a forfeiture is furnished by the case of *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694. The effect of all these cases is that relief from forfeiture cannot be awarded to one who fails to show that his breach of duty was not grossly negligent, *wilful*, or fraudulent." (Emphasis ours).

The appellants have not by their pleadings sought to declare a forfeiture. What they wanted was for the buyers to go through with the agreement. By their second count, the buyers are seeking relief from a forfeiture before it is declared. This they may not do.

Appellees, in their lower court brief, urged that if the Court found for the appellants and cross-complainants on the first count stated in the complaint, and if the appellees were not entitled to recovery of the earnest money and down payment under that count, then they should be relieved from the forfeiture under the provisions of Section 17-102, Revised Codes of Montana, 1947, which for the convenience of the Court, is here set out again:

"Whenever, by the terms of an obligation of a party thereto incurs a forfeiture or a loss in the nature of a forfeiture by reason of his failure to comply with its provisions, he may be relieved therefrom upon

making full compensation to the other party except in the case of grossly, negligent, wilful, fraudulent breach of duty.”

Appellants alleged in their answer and cross-complaint that the appellees were in their conduct in this case, grossly negligent, wilful and guilty of a fraudulent breach of duty. We have alleged that they did not act in good faith. We believe the record justifies our position and as we have set out earlier in this brief by the testimony of Mrs. Clermont, their objection to the status of the Jannsen obligation was not made in good faith. As to the second objection to the title relied upon, the lien of the construction charges for the irrigation district, they had the power to discharge the obligation out of the payment to be made to Woodbury. They assumed the payment of the water charges. Their actions in making the two objections were not based on any genuine concern as to the sufficiency of the title.

Their only purpose in making the objections was to get out of their obligations under the agreement to buy the property. Their actions come within the provisions of the exception contained in the statute.

In the case of *Cook Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694, the Court held that if there were no gross negligence or wilful or fraudulent breach of duty under this statute, the buyer would be entitled to a return of his payment:

“In excess of respondent’s (sellers) damage.”

The testimony that the property involved had declined in value more than the amount of the down payment is uncontroverted.

If the conduct of the Clermonts brings them within the Cook Reynolds case, they still could get no part of the down payment back since the damage to the seller exceeds the amount of the down payment.

The amount of recovery where it is determined that the buyer is entitled to relief from forfeiture is stated in *Fontaine v. Lyng*, 61 Mont. 590, 599, 202 Pac. 1112:

“If, then, the actual damages sustained by defendants, are less in amount than the money paid by the plaintiff upon his contract, plaintiff is entitled to reimbursement to the extent of the excess payments.”

Accepting then the argument of the appellees that they are entitled to relief from forfeiture, there could still be no recovery because the uncontroverted testimony is that the value of the land has decreased more than the amount of the down payment.

IV. CONCLUSION

Not much time has been devoted in this brief to the question of whether the Court properly ordered Mr. Woodbury rather than the real estate agent Hagarty, who is not a party to this action, to pay the \$1,000.00 which made up a portion of the \$5,000.00 down payment. But since Mr. Clermont undertook to make payment directly to the real

estate man it is submitted in this conclusion that Mr. Clermont should seek his return of this money from the man to whom he voluntarily paid it over rather than from Mr. Woodbury if indeed the appellees have any right at all to have this \$1,000.00 returned to them.

It is respectfully submitted that the complaint of the appellees should be dismissed and judgment entered for the appellants because:

- (1) There was neither allegation of a tender or performance or of an offer to perform by the appellees;
- (2) The records show that there was no tender or offer to perform either made or communicated to the appellants;
- (3) By the terms of the agreement between the parties, conveyance was to be made by contract for deed. By the agreement, the appellees assumed the obligations of the contract between the appellees and Bernhard Jannsen, and knew and fully understood the essential nature of the obligations they assumed;
- (4) The appellees were advised of the amount of the water charges and were advised that the information concerning those charges was available in the public record, and from their conduct and their knowledge and their opportunities to secure full knowledge, they waived any right to object to the lien of the construction charges;

- (5) If the appellees did not waive a right to object to the lien of the construction charges for the irrigation project by the terms of the contract they could have required that the lien be discharged out of the moneys owing to the sellers under the contract;
- (6) The damages to the appellants were greater than the amount of the down payment and there could, therefore, be no relief from a forfeiture of the down payment even if there had been pleadings seeking to declare a forfeiture;
- (7) The appellees have no good-faith concern over the title to this property and are only concerned in trying to get out of this deal because they have regretted their bargain.

We respectfully submit that for the foregoing reasons the judgment should be reversed.

Respectfully submitted,

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**In The United States
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For the Ninth Circuit**

GLENN WOODBURY and PEARL WOODBURY,
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ALFRED CLERMONT and MARGUERITE I.
CLERMONT,
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ON APPEAL FROM THE UNITED STATES
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BRIEF FOR THE APPELLEES

RUSSELL E. SMITH

W. T. BOONE

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DANIEL P. O'BRIEN

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CLERMONT,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MONTANA

BRIEF FOR THE APPELLEES

JURISDICTION

This appeal involves an action by Alfred Clermont and Marguerite I. Clermont as plaintiffs (Appellees here), both citizens of the Dominion of Canada, against Glenn Woodbury and Pearl Woodbury as Defendants (Appellants here), both citizens of the State of Montana, for the sum of Five Thousand Dollars (\$5,000.00) earnest money deposit under a contract for the sale and purchase of real

property which Appellees allege was breached by Appellants.

Jurisdiction was conferred upon the District Court by 28 U.S.C.A. 1332, Subdivision (a) 2. Paragraph I of the Complaint (R. p. 3) alleges the diversity of citizenship and that the amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs. The allegations of this Paragraph I of the Complaint are admitted by the Second Defense of the Answer (R. p. 19).

Judgment in favor of plaintiffs (Appellees here) was entered February 4, 1955 (R. p. 38-39) and within thirty days and on March 2, 1955, the Defendants (Appellants here) filed a Notice of Appeal (R. p. 40). The jurisdiction of this court is invoked under 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

Appellees brought this action against Appellants to recover the \$5,000.00 earnest money deposit made under a written contract, designated "Receipt and Agreement to Sell and Purchase," entered into on May 2, 1953 and providing for the sale of a ranch in Montana, for the total sum of Thirty-six Thousand Dollars (\$36,000.00), from Appellants as Sellers to Appellees as Purchasers. The execution of the contract is admitted by the pleadings (Complaint, Paragraph II, R. p. 3-4; Answer, Second Defense, R. p. 19) and it appears as Exhibit A to the Complaint (R. p. 11) and was introduced in evidence as Plaintiffs' Exhibit 3 (R. p. 127) and appears again on page 260 of the Record.

Paragraph numbered one of this contract provides:

“1. It is further agreed: Seller shall at his expense furnish Purchaser an Abstract of Title continued to a date subsequent hereto showing merchantable title to the above described property vested in Seller, or in lieu thereof, at Seller’s option, a title insurance policy insuring title thereto vested in Purchaser, free and clear of all liens and encumbrances, except Mortgage to B. Jannsen \$16,200.00 and Federal Land Bank, \$3563.98.

It is further agreed that the broker assumes no responsibility in regard to the title and broker recommends that Purchaser have the Abstract of Title or Title Insurance Policy examined by an attorney.”

Paragraph numbered four of this same contract provides:

“4. If Seller does not approve this sale within approved days hereafter, or if Seller’s title is not merchantable or insurable and cannot be made so within a reasonable time after written notice containing statement of defects is delivered to Seller, then said earnest money herein receipted for shall be returned to the Purchaser on demand and all rights of Purchaser terminated unless Purchaser waives said defects and elects to purchase; but if said sale is approved by the Seller and Seller’s title is merchantable or insurable and purchaser neglects or refuses to complete the purchase or shall fail to pay the balance of the purchase price as hereinabove provided, then the said earnest money shall be forfeited to the Seller as liquidated damages and not as a penalty and this Agreement thereupon shall be of no further force or effect.”

On the date of execution of said contract, May 2, 1953, Appellees paid the sum of \$5,000.00 as an earnest money deposit to Appellants (Paragraph III of the Complaint, R. p. 4; admitted by Second Defense of Answer, R. p. 19).

On June 11, 1953, the Appellees made demand upon Appellants for an abstract of title (Plaintiffs' Exhibit No. 2, R. p. 52-53) in the form of a letter, the receipt of which was admitted by Mr. Woodbury, one of the Appellants (R. p. 115). The abstract of title was furnished to attorneys for Appellees on June 18, 1953 (R. p. 118) and written notice containing a statement of defects in the title rendering it unmerchantable was sent by Appellees to Appellants on June 22, 1953. This notice is attached to the Complaint as Exhibit B and the receipt thereof is admitted by Appellants both in the pleadings (Complaint, Paragraph VII, R. p. 6; admitted by Second Defense of Answer, R. p. 20) and by the testimony (R. p. 118).

On July 27, 1953, Appellees again wrote to Appellants concerning the defects in the title to the real property. This letter appears as Exhibit C to the Complaint (R. p. 16) and the receipt of it is admitted by Appellants both in the pleadings (Complaint, Paragraph VIII, R. p. 6; admitted by Second Defense of Answer, R. p. 20) and by the testimony (R. p. 107).

By letter of July 30, 1953, Appellants advised Appellees that the two letters from Appellees of June 22, 1953 and July 27, 1953 had been turned over to attorneys for Appellants who were checking over the objections made to the title and further, "You may be assured that the matter is being promptly taken care of and that we will act on the advice of our attorneys in the matter of clearing up any defects in merchantability of title." The writing and receipt of this letter is likewise admitted by the pleadings and also the testimony (Complaint, Paragraph

IX, R. p. 6 and 7; admitted by Second Defense of Answer, R. p. 20).

Whereas the written contract between the parties (R. p. 11, 260) required Appellants as Sellers to furnish an abstract of title showing in Sellers merchantable title to the real property, except for mortgage to B. Jannsen and Federal Land Bank, the abstract actually disclosed that the title to the property stood in the names of Bernhard Jannsen and Anna Jannsen (Complaint, Paragraph V, R. p. 5; admitted by Second Defense of Answer, R. p. 19; also admitted in testimony of Glenn Woodbury, R. p. 71, 136). Instead of holding title, Appellants were purchasing the real property under a contract of sale from the Jannsens, a copy of which was furnished to attorneys for Appellees at the time the abstract of title was delivered to them (R. p. 71).

In addition to the mortgage in favor of the Federal Land Bank, the abstract also disclosed that the real property was encumbered by the lien of a repayment contract between the Bitter Root Irrigation District and the United States in an undisclosed amount (Complaint, Paragraph VI, R. p. 5; admitted by Second Defense of Answer, R. p. 19-20; also proved by testimony of Elsie W. Oliva, R. p. 47-48). A copy of that repayment contract was introduced in evidence as Defendants' Exhibit 1 and appears in the Record at pages 224 to 259. This lien extended to 121 acres of the lands which were the subject of the contract of sale involved in this action and the amount of the lien per acre on May 2, 1953, the date of said contract, was \$39.26, making a total lien of \$4,750.46 against said prop-

erty (R. p. 47-48). A payment by the Bitter Root Irrigation to the United States in July of 1953 reduced the amount of the lien per acre to \$38.37, thereby reducing the total lien against the property in question to \$4,642.77 (R. p. 47-48).

These defects in title were not remedied by Appellants (R. p. 54, 65, 121) notwithstanding Appellants' letter of July 30, 1953 (Complaint, Exhibit D, R. p. 17) which indicated some action would be taken and notwithstanding Mr. Woodbury's testimony at the time of trial that he was in a position to pay off the Jannsen contract so as to obtain title and also to pay the construction charges of the irrigation district and thereby remove the property from that lien. (R. p. 108 and 109). Because no action was taken by Appellants to remove the defects, this action was filed by Appellees on October 7, 1953.

The pleadings establish the execution of the contract between Appellants and Appellees, the earnest money deposit of \$5,000.00, delivery of abstract to Appellees, the existence of title defects, namely that the title stood in the names of the Jannsens rather than in Appellants and the existence of the lien of the Bitter Root Irrigation District, notice to Appellants of said defects in the title. The failure of Appellants to remedy those defects was established through evidence (R. p. 121).

Through a second cause of action, Appellees sought relief from forfeiture under the provisions of Section 17-102, Revised Codes of Montana of 1947 which reads as follows:

“Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.”

Possession of the ranch property was retained by Appellants, never delivered to Appellees (R. p. 56, 67, 137). Appellants harvested the 1953 crop and kept the entire crop (R. p. 137-138). The freedom of Appellees from gross negligence, and willful or fraudulent breach of duty is to be gathered from the evidence as a whole.

The trial court's Findings of Fact and Conclusions of Law (R. p. 31-38) determined any conflict of fact in favor of Appellees and held that Appellees were entitled to the return of the \$5,000.00 earnest money deposit under the terms of the contract, and also found that Appellees had established their right to equitable relief under Section 17-102, R.C.M. 1947 which was, however, co-extensive with their legal right in view of the fact that **Appellees were** never in possession of the property. Accordingly judgment was entered in favor of Appellees and against Appellants in the amount of \$5,000.00 with interest from October 7, 1953 and for costs of Appellees (R. p. 38-39).

QUESTIONS INVOLVED

Because of the lack of specificity in Appellants' so-called *Assignments of Error*, it is rather difficult to narrow the issues being presented by Appellants on this appeal. However, from contentions made by Appellants in

the trial court and from Appellants' brief before this Court, the following questions seem to be raised:

- (A) Was payment by Appellees of the entire purchase price balance of \$11,000.00 a condition precedent to Appellants' obligation to furnish a merchantable title?
- (B) Was it necessary for Appellees to prove that they were ready, willing and able to perform under the contract and to prove a tender of the balance due on the purchase price?
- (C) Were the specified title defects waived by Appellees?
- (D) Did Appellees establish their right to relief from forfeiture under Section 17-102, R.C.M. 1947?

ARGUMENT

It is extremely difficult to meet the argument presented in the Brief of Appellants because the Assignments of Error do not raise objection to any specific Finding of Fact or Conclusion of Law made by the Trial Court. That portion of Appellants' Brief entitled "Assignments of Error" raises several general propositions and the Appellants' argument does not even follow the questions raised under the so-called "Assignments of Error." Consequently the discussion in Appellees' Brief must be general in nature.

A. NO PROPER SPECIFICATION OF ERROR

There is an absolute failure in the Brief of Appellants to comply with Rule 18 (d) of the Rules of the

United States Court of Appeals for the Ninth Circuit, which provides, in part:

“In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged. . . . In all cases, when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusion of law are alleged to be erroneous.”

It is significant to note that there is no specification of error as to any Findings of Fact or as to any Conclusion of Law made by the Trial Court and it is therefore urged that the Findings of Fact and Conclusions of Law should be accepted inasmuch as no direct attack is made upon any specific Finding of Fact or Conclusion of Law.

In *United States v. Cushman*, 136 Fed. (2) 815, a Ninth Circuit decision, it was said:

“Appellant could have specified these findings as error and could thereby have raised the question of the sufficiency of the evidence to support the findings, but has not done so. We nevertheless have examined the evidence and have satisfied ourselves that it does support the findings, that the findings are not clearly erroneous, and that therefore we ought not to set them aside. . . . The second specification is that ‘the trial court erred in ordering judgment.’ This is not a proper specification of error. It does not set out particularly, or at all, the error, if any, intended to be urged. It specifies nothing, presents nothing for review.”

The “Assignments of Error” made by Appellants do no more than assert that the Trial Court erred in entering

judgment for Appellees. Under the holding of the case cited above, this presents nothing for review.

B. FINDINGS OF FACT CONCLUSIVE UNLESS CLEARLY ERRONEOUS

The Federal Rules of Civil Procedure, Rule 52 (a) provides, in part:

“Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses.”

Upon the basis of this rule, it has been held that the Findings of Fact of a Trial Court are presumptively correct and will not be set aside unless they are clearly erroneous, giving due regard to the Trial Court's opportunity to judge the credibility of the witnesses.

Wingate v. Bercut et al, 146 Fed. (2d) 725 at page 728 (Ninth Circuit)

Paramount Pest Control Service v. Brewer, 177 Fed. (2d) 564 at page 567 (Ninth Circuit).

Pacific Portland Cement Co. v. Food Machinery & Chemical Corporation, 178 Fed. (2d) 541 at page 548 (Ninth Circuit).

36 C.J.S. Page 408, Sec. 297 (3) (a) under Federal Courts.

Most of the essential allegations of the Complaint are admitted by the Answer so that there are very few fact issues or combined issues of fact and law for determination by the Trial Court. On those issues, it is urged, Appellants cannot claim the benefit of the weight of the evidence and on the contrary, the weight of the evidence, in the view of Appellees, preponderates in their favor. At

the most, it can be said that the evidence on these issues was conflicting and therefore it is urged that the Findings of Fact and Conclusions of Law made by the Trial Court should be given the benefit of the presumption noted above.

C. SUMMARY OF THE EVIDENCE

The admissions in the pleadings, coupled with the uncontroverted testimony of witnesses, establishes the following sequence of events:

- (1) *May 2, 1953*: Execution by the parties of Receipt and Agreement to Sell and Purchase (R. p. 11, 260).
- (2) *June 11, 1953*: Letter from Appellees to Appellants requesting delivery to them or their attorneys of an Abstract of Title for the real property which was the subject of the sales agreement (Plaintiffs' Exhibit numbered 2, R. 52-53).
- (3) *June 15, 1953*: Glenn Woodbury called upon W. T. Boone, one of the attorneys for Appellees, but refused to leave the abstract of title unless Mr. Boone paid the balance of \$11,000.00 due on the purchase price (R. p. 104-105, 116).
- (4) *June 18, 1953*: Glenn Woodbury, after consultation with his attorneys, delivered to Mr. Boone the abstract of title and a copy of the agreements between Jannsens and Woodburys (R. p. 106-107, 117-118).
- (5) *June 22, 1953*: Letter from the Clermonts (Ap-

- pellees) to the Woodburys (Appellants) specifying defects found in the abstract of title to the real property which was the subject of the sale agreement (Complaint Exhibit B, R. p. 13-15; receipt thereof acknowledged by Appellants through Second Defense of Answer, R. p. 20, and also by the testimony of Glenn Woodbury, R. p. 107, 118).
- (6) *July 27, 1953*: Letter from the Clermonts (Appellees) to the Woodburys (Appellants) calling attention of the Woodburys to the fact that in more than one month that had elapsed since the letter of June 22, 1953 specifying defects found in the title, no response had been received from the Woodburys (Complaint Exhibit C, R. p. 16-17; receipt acknowledged by Second Defense of Answer, R. p. 20, and also by the testimony of Glenn Woodbury, R. p. 107).
- (7) *July 30, 1953*: Letter from the Woodburys (Appellants) to the Clermonts (Appellees) acknowledging receipt of the Clermonts' letters of June 22 and July 27, 1953, advising that the matter had been turned over to the Woodburys' attorneys and that "we will act upon the advice of our attorneys in the matter of clearing up any defects in merchantability of title." (Complaint Exhibit D, R. p. 17; receipt admitted by Appellees through Complaint, Paragraph IX, and the writing of the letter admitted by Ap-

pellants in the testimony of Glenn Woodbury (R. p. 120).

- (8) *October 7, 1932*: Complaint filed in this action (R. p. 17) with nothing having been done in the interim by Appellants to remedy the defects in title (admitted in the testimony of Glenn Woodbury, R. p. 121).

In addition to the sequence of events scheduled above, there was testimony introduced by Appellants over the objection of Appellees, relating to several conversations between Appellants and Appellees through which the Appellants urged the Appellees received notice and knowledge of (a) the fact that the relationship between the Woodburys and the Jannsens was a contract of sale rather than a mortgage, and (b) that the real property which was the subject of the sales agreement was encumbered by a lien of the Bitter Root Irrigation District under a repayment contract with the United States of America. Notice and knowledge of these two facts through the conversations were denied by Appellees.

D. PAYMENT OF FULL PURCHASE PRICE NOT CONDITION PRECEDENT TO QUESTION OF TITLE

Appellees take the position that Appellants were required under the sales agreement to furnish the abstract showing merchantable title prior to payment by Appellees of the balance due. This position is based upon: (a) the language of the contract, (b) the conduct of the parties

which in itself constituted an interpretation of the written contract, and (c) existing Montana law.

The Contract Language

The written contract (R. p. 11, 260) through its first numbered paragraph requires Seller to "furnish Purchaser an Abstract of Title continued to date subsequent hereto showing merchantable title to the above described property vested in Seller, or in lieu thereof at Seller's option, a title insurance policy insuring title thereto vested in Purchaser, free and clear of all liens and encumbrances, except mortgage to B. Jannsen, \$16,200.00 and Federal Land Bank, \$3,563.98."

Subsequently numbered Paragraph 4 of the contract provides that "if Seller's title is not merchantable or insurable and cannot be made so within a reasonable time after written notice containing a statement of defects is delivered to Seller, then *said earnest money herein receipted for shall be returned to Purchaser on demand. . .*"

Taking the obligations to be performed under the contract, the obligation of the Seller to furnish the abstract under Paragraph 1 is the first obligation specified in the contract. Nothing is said in Paragraph 4 about returning any part of the purchase price other than the "*earnest money herein receipted for,*" indicating that the parties did not intend that the Purchasers be required to put up any additional money before the merchantability of the title was shown.

Paragraph 4 of the contract further provides: "But if said sale is approved by the Seller and Seller's said

title is merchantable or insurable and Purchaser neglects or refuses to complete the purchase or shall fail to pay the balance of the purchase price as hereinabove provided, then said earnest money shall be forfeited to the Seller . . .” This provision further demonstrates that the merchantability of title is to be determined before any further sum becomes payable on the purchase price.

Interpretation by the Parties.

It is admitted through the pleadings that on June 11, 1953 Appellees requested that Appellants furnish the abstract under the terms of the written contract and that having first refused to deliver the abstract on June 15, 1953 unless the balance of the purchase price were paid, and subsequently discussing the matter with their attorneys (R. p. 106-107, 117) the Appellants furnished said Abstract on June 18, 1953. Thus the parties themselves interpreted the contract as requiring merchantability of title to be determined prior to final payment by Appellees.

There are many Montana decisions which state that the interpretation placed upon a contract by the parties themselves is to be considered by the Court and is entitled to great influence in ascertaining their understanding of its terms.

Marias River Syndicate v. Big West Oil Co., 98 Mont. 254, 38 Pac. (2d) 599

Cook-Reynolds Co. v. Beyer, 107 Mont. 1, 79 Pac. (2d) 658

Smith v. School Dist. No. 18, 115 Mont. 102, 139 Pac. (2d) 518

Erie v. Wahl, 116 Mont. 515, 155 Pac. (2d) 201.

Montana Decisions.

The Appellees' First Cause of Action is not one for rescission but is an action based upon breach of the contract by Appellants. This distinction is recognized and expressed in the Montana case of *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694, where it was said:

"There is a wide difference between the rescission of a contract and its mere termination or cancellation. 'It is well settled that a technical rescission of the contract has the legal effect of entitling each of the parties to be restored to the condition in which he was before the contract was made, so far as that is possible, and that no rights accrue to either by force of the terms of the contract. But, besides technical rescission, there is a mode of abandoning a contract as a live and enforceable obligation which still entitled the party declaring its abandonment to look to the contract to determine the compensation he may be entitled to under its terms for the breach which gave him the right of abandonment.' "

Even if the clear language of the contract (Paragraphs 1 and 4) were to be disregarded and further, even if the interpretation placed upon that contract by the parties were likewise to be disregarded, the Appellants became obligated under Paragraph 2 of the contract to convey title "free and clear of all encumbrances except building and zoning ordinances and regulations. . . ." Where this type of warranty of title is made, even if the contract did not have the provisions of Paragraphs 1 and 4 thereof, Appellants would be obligated by the Montana decisions noted below to demonstrate the merchantability

of their title before Appellees became obligated to pay the balance due on the purchase price.

In *Bozdech et al v. Montana Ranches Co.*, 67 Mont. 366, 216 Pac. 319, our Court stated:

“When a vendor is unable to convey the title stipulated for in his contract at the time a conveyance is due, the vendee is not required to make any tender of the balance of the purchase price as prerequisite to his right to rescind.”

Again in *Silfvast v. Asplund*, 93 Mont. 584, 20 Pac. (2d) 631, it was said:

“The purchaser has the right to expect the removal of the defects before the time set (Maupin, above, 638; *Bell v. Stadler*, 31 Idaho, 568, 174 Pac. 129; *Higgins v. Eagleton*, 155 N. Y. 466, 50 N. E. 287), as the rule which allows a vendor to remove defects after the time for final performance does not apply when time is of the essence of the contract. (Maupin, above, 883).”

E. OFFER OF PERFORMANCE BY APPELLEES NOT AN ISSUE

Appellees contend that it was not necessary for them to prove that they were ready, willing and able to perform as a prerequisite to casting upon Appellants the obligation of furnishing merchantable title. What has been said above with respect to the claim by Appellants that they were not obligated to disclose merchantable title until Appellees had paid in full the balance on the purchase price applies likewise at this point and the Court's contention is directed to the decisions of *Bozdech et al v. Montana Ranches Co.* and *Silfvast v. Asplund*, both *supra*.

Another decision in this same connection is that of *Milwaukee Land Co. v. Ruesink, et al*, 50 Mont. 489, 148 Pac. 396, a case involving a contract for sale of real property.

The Montana Court held:

“The variance is in the single particular as to when and how the balance of the purchase money was to be paid; otherwise the contract as alleged, and the terms of it, are clearly shown. The subject matter, the parties and the consideration were the same as alleged, and the obligation to make payment was the same. The plaintiff did not have title. It therefore could not, under the agreement as alleged or under that proved, have demanded performance by Way & Ratchford until it could tender a title.”

In view of the specific provisions of the written agreement between the parties, in view of the interpretation of that agreement by the conduct of the parties, and in view of the Montana decisions noted herein, it is submitted that it was not necessary for Appellees to prove that they were ready, willing and able to perform. However, if that were a necessity, the evidence in this case supplies it. Marguerite I. Clermont, one of Appellees, testified as follows: (R. p. 183-184).

Q. All right, now, after that conversation with Mr. Woodbury, did you then come to Missoula to make arrangements, financial arrangements for the money that would be necessary to meet this contract:

A. Yes, we did.

Q. And were you, on June 15th, ready and willing financially to make the payment which was required under this contract to the Woodburys, \$11,000, if the title had been satisfactory?

A. Yes. (Italics ours).

Mrs. Clermont again, under cross examination, testified that had the title been merchantable, she and Mr. Clermont were ready, willing and able to pay the balance due on the purchase price. (R. p. 186, 198 and 199).

Furthermore, although now insisting that Appellees were in default after June 15, 1953, the due date for the balance of the purchase price, Mr. Woodbury at the time of trial testified that he had agreed to extend the time for payment of the balance due. His testimony in this regard is as follows: (R. p. 101)

A. I asked what the trouble was. He informed me again he wasn't able to get the money he had coming, and *I told him I wasn't going to hold him to that specific date.* He said that he couldn't afford to lose the money. I said, 'I don't want you to lose your money; I don't want your money for nothing, I merely want to complete the deal. I sold the place to you in good faith and I thought you bought it in good faith. *All I want is to complete the deal, but as far as the date of the 15th of June, I don't figure on holding you to it if you don't have the money at that time.*' (Italics ours.)

Again, under cross examination, Mr. Woodbury testified: (R. p. 135)

"Q. They were asking for the time of payment to be changed so they could be sure and have the money available?

A. That's right.

Q. You refused to do that?

A. No, I didn't refuse to change the time of payment; I refused to put it on a contract for them. I told them I would give them more time, but I didn't want to write a contract and carry it. I wanted it by fall. *I told them I would give them until fall if they needed it.*"

F. NO WAIVER BY APPELLEES

The evidence of Appellants as to conversations goes no farther than to assert notice and knowledge on the part of Appellees of the existence of the Jannsen contract of sale rather than the Jannsen mortgage, and of the existence of the lien of the United States of America by reason of its contract with the Bitter Root Irrigation District. Even if these conversations took place to the extent of giving notice and knowledge of the defects to Appellees, they do not excuse performance by Appellants under Montana law.

In *Bozdech et al v. Montana Ranches Co.*, 67 Mont. 366, 216 Pac. 319, mentioned supra, the Montana Court held:

“Three of the cases cited by appellant directly and the other one indirectly rely upon *Memmert v. McKeen*, 112 Pa. 315, 4 Atl. 542. The opinion in that case contains the following classification of encumbrances: ‘Encumbrances are of two kinds, viz., (1) Such as affect the title; and (2) those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or a right of way, of the latter. Where encumbrances of the former class exist, the covenant referred to, under all the authorities, is broken the instant it is made, and it is of no importance that the grantee had notice of them when he took the title. (*Catheart v. Bowman*, supra; *Funk v. Voncida*, 11 Serg. & R. 109). Such encumbrances are usually of a temporary character, and capable of removal; the very object of the covenant is to protect the vendee against them; hence *knowledge, actual or constructive, of their existence, is no answer to an action for breach of such covenant.*’ The authorities are unanimous in supporting what is therein said concerning encumbrances af-

fecting the title to lands. (See cases cited under section 913 in Devlin on Deeds and in the notes in 4 L.R.A. (n.s.) 309, and 32 L.R.A. (n.s.) 737). This court has recently expressed approval of that rule of *Adams v. Durfee*, ante, p. 315, 215 Pac. 664." (Italics ours).

See also *Ayers v. Buswell*, 73 Mont. 518, 238 Pac. 591.

Even if the evidence of these conversations went beyond notice and knowledge alone and constituted a waiver, under the provisions of Section 13-607, R.C.M. 1947, parol evidence of any alleged oral waiver would be inadmissible. This section provides:

"Effect of written contracts. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

Section 13-907, R.C.M. 1947, provides:

"Written contracts—how modified. A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

In *Hollensteiner v. Anderson*, 78 Mont. 122, 252 Pac. 796, the plaintiff Hollensteiner brought the action to foreclose a vendee's lien for the amount paid on a contract for the purchase of real estate upon failure of consideration based upon defects in the vendor's title. Defendant was permitted, over the objection of plaintiff, to show that plaintiff understood that the property was being purchased without the timber. Upon appeal it was held that the admission of this testimony was error, the Montana Supreme Court saying:

"If this testimony was competent to vary the terms of the contract, we would still have the title encum-

bered by the mineral reservations and the right of way; but as the deed was a unilateral contract not delivered to or accepted by the vendees, the contents of which were not known to the vendees, and the contract was complete in itself and did not require the vendees to determine whether the deed correctly described the property, but required the vendor to execute and deposit a deed conveying the property as therein described, the contract of June 11, 1918, is presumed to contain all the terms of the agreement between the parties. If it was the tentative agreement of the parties that the purchase was of the land subject to the rights of the Anaconda Company, the vendor should have had his contract so drawn; *having failed to do so, he was precluded by the provisions of section 10517, Revised Codes of 1921, from varying the terms of the written contract by parol evidence—a sad commentary on the practice of having important legal documents drawn by a layman.* This testimony, admitted over the objection of plaintiff, was therefore improperly admitted and cannot aid the findings made.” (Italics ours).

See also *Bauer v. Monroe*, 117 Mont. 306, 158 Pac. (2d) 485; *Hart v. Barron*, 122 Mont. 350, 204 Pac. (2d) 797.

The evidence introduced by Appellants with respect to the conversations which are urged as constituting a waiver of the title defects were introduced over objection and received by the Court subject to the objection. The Appellees on rebuttal denied knowledge or notice of the title defects through the alleged conversations and thus even if this parol evidence properly could be received to vary the terms of the written contract, the testimony of Appellants with respect to the conversations was denied

and the Findings of Fact by the Trial Court should be conclusive on the conflicting testimony.

G. RELIEF FROM FORFEITURE

The Second Cause of Action of the Complaint seeks relief from forfeiture under the provisions of Section 17-102, R.C.M. 1947, which is quoted above.

One of the early Montana cases under this section is that of *Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694, which was an action by plaintiff, as vendor, to recover possession of property and also to recover damages for unlawful withholding arising from a contract of sale between the plaintiff, as vendor, and the defendant, as vendee. The answer asked for the return to buyer of the \$5,000.00 down payment, less a reasonable rental for the property until restored to the possession of plaintiff, and upon appeal it was held that the buyer's prayer for this relief should have been granted. The Court said:

"We think the evidence as a whole shows that the appellant's breach of duty was not grossly negligent, willful, or fraudulent, and that it was entirely practical and not difficult to ascertain the damages of respondent on principles of compensation in accordance with the provisions to the statute. In these circumstances, appellant was in position to ask relief from the forfeiture of his payments in excess of respondent's damage, and that relief should in this case have been granted to him because of the conduct of respondent toward him and its effect upon him as detailed above."

See also *Huston v. Vollenweider*, 101 Mont. 156, 53 Pac. (2d) 112.

In the case at bar possession of the real property was

never delivered to Appellees and the Appellants consequently had the benefit of the rents, issues and profits thereof. Thus there was no consideration to be returned to Appellants and the Trial Court accordingly found that the Appellees had established their right to relief from forfeiture which was, however, co-extensive with their legal right under the contract in question to recover the \$5,000.00 earnest money deposit.

The relief granted by the Court under the Second Cause of Action is not made the subject of any Assignment of Error by Appellants and is merely argued under Paragraph F, Page 39 to 43 of Appellants' Brief. It is submitted that Appellants have not raised for review the question of relief from forfeiture by reason of their failure to specify error in that connection. It is accordingly submitted that the Trial Court's Finding of Fact and Conclusion of Law with respect to forfeiture should be conclusive.

The written agreement in this case is dated May 2, 1953, the abstract was delivered June 18, 1953, the defects in title certified in writing to Appellants on June 22, 1953 and Mr. Woodbury testified that he re-listed the property for sale during the month of July 1953. (R. p. 122). The Clermonts never took possession of the premises, had no return from the property, and it is admitted that all the rents and profits for the year 1953 accrued to the Appellants (R. p. 137-138).

Because of the Appellants' failure to remedy the title defects in a period of more than three months, the Clermonts were compelled to institute this action to recover

the earnest money deposit of \$5,000.00 and had to return to Canada to attempt to re-establish themselves in a home and business (R. p. 58-59). It is submitted that the evidence shows that the Clermonts, in each instance, acted in good faith and without delay and that they were not guilty of any grossly negligent, fraudulent or willful breach of duty.

The Appellants argue that no formal declaration of forfeiture had been made by them and that therefore Appellees cannot ask for relief from forfeiture. It should be noted that Section 17-102, R.C.M. 1947, provides that "whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture. . . ." Certainly if, Appelles were refused relief under the First Cause of Action, they would face a loss of \$5,000.00 "in the nature of a forfeiture," and it is against that possibility that Appellees asked for relief from forfeiture under their Second Cause of Action.

H. OTHER CONTENTIONS BY APPELLANTS

In addition to the problems discussed above, Appellants' Brief argues various other questions to which it is felt some response should be made.

Ambiguity of the Agreement.

Appell^{ants}ants' whole argument is predicated upon their assertion that the agreement is ambiguous and therefore, they urge, resort must be had to parol evidence. To the contrary, there is no ambiguity in paragraphs 1 and 4 of the agreement which are the portions involved in this case. They very clearly required Appellants as Sellers to fur-

nish an abstract showing merchantable title, in default of which, after notice of the title defects, Appellants were to have a reasonable time to remedy the title. If the title was not made merchantable, Sellers became obligated to return the earnest money payment of \$5,000.00. There is no ambiguity in these requirements.

If there be any ambiguity in the provisions of the agreement which are material in the case at bar, and it is submitted there is not, that ambiguity and the agreement itself must be interpreted under Montana law most strongly against the Appellants whose agent Hagarty (R. p. 124) prepared the agreement (R. p. 127). *Aleksich v. Mutual Benefit Health & Accident Ass'n.*, 118 Mont. 223, 164 Pac. (2d) 372, 162 A.L.R. 263.

Mr. Woodbury doubted that he read the agreement before signing it (R. p. 128) and his wife admitted she did not read it (R. p. 216). Mr. Hagarty, however, recalled that he read the agreement out loud to all of the parties (R. p. 173). In any event, Appellants should not be heard to charge ambiguity in any of the provisions of the agreement material to this case.

Reformation Not an Issue

There is no pleading or prayer by Appellants for reformation of the contract. There is no Specification of Error grounded upon reformation. It is not an issue in this case.

Even if it properly were an issue, Appellants have not established any right to reformation under the Montana case of *Sullivan v. Marsh*, 124 Mont. 415, 225 Pac. (2d)

868, in which it states that reformation must be based upon mutual mistake, the court saying:

“The presumption is that the writing contains the final agreement of the parties and expresses their real purpose and intent. To meet and overcome that presumption plaintiff was required to present clear, convincing and satisfactory proof. . . . The general rule is that to obtain reformation the mistake must be mutual. . . . The record before us fails to show any mutual mistake.”

Defects to be Remedied by Appellants

Appellants, tacitly admitting that they did nothing to remedy the defects of title, suggest that the defects should have been remedied by the Clermonts, notwithstanding the assurances given by Appellants in their letter of July 30, 1953 which said in part: “You may be assured that the matter is being promptly taken care of . . .”

The obligation under paragraph one of the agreement to furnish an abstract showing merchantable title is that of the Appellants as Sellers—not that of Appellees. Under paragraph 4 of the agreement, notice of the defects in the title is to be delivered to “*Seller*.” Thus, under the written agreement, Appellants had the obligation of furnishing merchantable title.

The Appellants’ letter of July 30, 1953 represents that they were assuming that obligation. No request was made that the Clermonts as purchasers should assume that obligation and no suggestion was offered that the money value of the defects might be computed and deducted from the balance due on the purchase price. Even if the value of the Irrigation District lien could be de-

terminated and subtracted from the purchase price, which suggestion was not made, there would have been no way to convert the relationship between Appellants and the Jannsens from contract for deed to that of a mortgage, especially when the balance due under that mortgage far exceeded the balance due on the purchase price. The advantage of the mortgage relationship, with necessity of foreclosure in event of breach, right of redemption, right of occupancy during the one year redemption period need not be argued.

Hagarty's One Thousand Dollars

Appellants even argue that they should not be asked to return the entire \$5,000.00 earnest money deposit because Mr. Hagarty, their real estate agent got \$1,000.00 of it. Mr. Hagarty was admittedly their agent (R. p. 124).

Paragraph III of the Complaint (R. p. 4) alleges payment by Appellees to Appellants of the \$5,000.00 earnest money deposit, an allegation admitted by the Second Defense of the Answer (R. p. 19).

CONCLUSION

Under the written agreement, Appellants assumed the obligation of furnishing an abstract disclosing merchantable title. The abstract was furnished, defects in the title duly specified by Appellees and Appellants undertook by their letter of July 30, 1953 to remedy the defects. Notwithstanding their assurances in that letter, which were in keeping with their contract obligation, Appellants absolutely failed in more than three months to do anything about the title defects. The following excerpt from the

testimony of Glenn Woodbury (R. p. 121) admits nothing was done:

Q. Then, was there any communication from you or from your attorney, either to the Clermonts, or to me, at any time after July 30th with respect to this matter before this action was commenced in October, October 7th?

A. Not to my knowledge.

Q. In other words, there was not one single thing either you or your attorneys did about communicating with the Clermonts or with me with respect to this title, with the exception of that letter on July 30th?

A. No, I guess not.

The obligations of Appellants is clear from paragraphs one and four of the agreement. Their failure to fulfill that obligation is admitted by the testimony quoted above.

There was ample evidence, in fact overwhelming evidence, to support each and all of the Findings and Conclusions of the Trial Court and the Judgment should be affirmed.

Respectfully submitted,

Russell E. Smith

W. T. Boone

Jack W. Rimel

Attorneys for Appellees

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLENN WOODBURY and
PEARL WOODBURY,
Appellants

vs.

ALFRED CLERMONT and
MARGUERITE I. CLERMONT,
Appellees.

No. 14,782

PETITION FOR RE-HEARING

FILED

SEP -5 1956

PAUL P. O'BRIEN, CLERK

To the United States Circuit Court of Appeals for the Ninth Circuit, and to the Honorable Circuit Judges thereof, Mathews, Healy and Fee:

Come now Glenn Woodbury and Pearl Woodbury, appellants in the above entitled cause and respectfully request that the said Circuit Court of Appeals re-hear, re-consider and alter the opinion and judgment herein made and given on the 10th day of August, 1956, upon the grounds and for the reason that the opinion of the Court disregards the fundamental rule of law that words especially inserted in a form contract will prevail over printed provisions. Section 93-401-19, Revised Codes of Montana, 1947, provides:

“Written words control those printed in blank form. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former control the latter.”

See also, *Backer v. Parker*, 87 Mont. 595, 599, 289 Pac. 571.

The opinion rendered violates this rule because it gives no effect to the provision in the contract reading: “Balance to Woodbury June 15, 1953.” And because of two printed form provisions of the contract the Court has construed this especially inserted typed provision just exactly as if it had not been in the contract at all.

The above rule of law would apply even if these provisions of the contract were completely inconsistent, which is not the case.

For it is quite possible to give effect to the provision of the contract requiring the \$11,000.00 payment to be made by June 15, 1953, as well as that requiring an abstract of title, as to the furnishing of which no date whatsoever is specified. Consequently, if the Circuit Court of Appeals is going to decide the case on the issue of whether the agreement required this payment

to be made on June 15, 1953, we respectfully submit that the contract could hardly be clearer in its terminology, and that even if there be considered an inconsistency therein, then under Montana law, the especially and particularly written payment date would control regardless of whether or not an abstract had been furnished by this time or not, time being of the essence.

The appellants have not sought to avoid the effect of their contract whatsoever, and are willing to perform it completely. And in fact, they have enough money coming from the appellees so that the lien of the irrigation ditch can be paid in full and still leave a balance for the appellants. This is in accordance with the language of paragraph three of the contract itself, which specifies:

“... encumbrances ... may ... be paid out of the purchase money at the date of closing.”

We think that the testimony given by one of the appellants himself standing uncontradicted as it does is the best legal exposition of his position that could be made. He said (Tr. 106):

“... I would make the abstract good, whatever it took, and when I made it good, *I wanted the money to be there as an assurance.* ...” (Emphasis ours)

And his contract gave him the right to have the payment of June 15th made to him on June 15th and to be there then as an “assurance” to cover any title expense to which the appellants might be put.

Thus, the appellant, under the clear terms of his contract, was not obliged to perfect any defects in the abstract until after the payment of June 15, 1953, was made to him. Since the payment was never made as required clearly by the especially typed insertion in the written contract—which we have seen would control over any general printed form provision even if inconsistent

entirely therewith—and since there is more than enough money for the payment of the irrigation ditch lien, and since the contract itself provides that the funds called for to be paid on June 15th could be used for this purpose, it is respectfully submitted that this re-hearing should be granted and the judgment of this Court changed so as to effect a reversal of the judgment from which this appeal is taken.

Respectfully submitted,

GLENN WOODBURY and PEARL WOODBURY,
Petitioners and Appellants.

Leif Erickson, Helena, Montana.

William F. Shallenberger,

D. A. Paddock, Missoula, Montana.

Attorneys for Petitioners and Appellants.

CERTIFICATE OF COUNSEL

The undersigned counsel for the appellants does hereby certify that in his judgment the petition for rehearing submitted herewith is well founded and that the same is not interposed for delay.

Dated August 31, 1956.

WILLIAM F. SHALLENBERGER
of Counsel for Appellants.

No. 14784

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MATT STANOVICH,

Plaintiff-Appellant,

vs.

ANTE JURLIN, *et al.*,

Defendants-Appellees.

APPELLEES' BRIEF.

FILED

AUG 18 1955

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PAUL P. O'BRIEN, CLERK

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No. 14784
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MATT STANOVICH,

Plaintiff-Appellant,

vs.

ANTE JURLIN, *et al.*,

Defendants-Appellees.

APPELLEES' BRIEF.

Jurisdictional Statement.

This is an appeal from a portion of a final judgment of the United States District Court for the Southern District of California, Honorable James M. Carter, in a civil action brought by a fisherman plaintiff on account of personal injuries sustained on board a fishing vessel. The first two causes of action in the complaint are not involved in this appeal. They were tried before a jury on theories of negligence under the Jones Act and unseaworthiness under the General Maritime Law. The third cause of action, which is involved in this appeal, was for maintenance and cure only.

The answer to the complaint challenged the court's jurisdiction over the third cause of action. The third

cause of action was heard and decided by the court below, sitting without a jury. No formal Order transferring the third cause of action to the admiralty side of the court was made, and we cannot agree with the appellant's jurisdictional statement that the third cause of action was actually heard by the court sitting in admiralty. We believe a more accurate statement is that the third cause of action was heard as a civil cause by the court sitting without a jury, and that so far as jurisdiction can be conferred by consent the parties, through their counsel, consented and agreed that the procedure suggested in the case of *Jordine v. Walling*, 185 F. 2d 662, should be followed.

We do not believe that this court has ruled upon the specific problems of jurisdiction which are posed by *Jordine v. Walling*, *supra*, and the contrary decision of the First Circuit in the case of *Doucette v. Vincent*, 194 F. 2d 834. In view of the unsettled state of the law on this point in this circuit we do not concede the point of jurisdiction. If the court below had jurisdiction of the third cause of action under 28 United States Code, Section 1333, it would follow that this court now has jurisdiction of the appeal. Jurisdictional facts were not alleged in the complaint to bring the third cause of action under either 28 United States Code, Section 1331, or 28 United States Code, Section 1332. We do not propose to further press the point of jurisdiction in this brief beyond directing the court's attention to the procedure which was followed below for review and approval or disapproval.

Statement of the Case.

The plaintiff was injured in a fish boat accident on November 12, 1953. He was received as a patient by the United States Public Health Service at San Pedro, California, on the same date as an ambulatory patient. He was found to be suffering from a bruise in the right groin. Note was made that he had an artificial left leg. No bone damage was found. Various calcifications involving the prostate and low back area were noted. Active out-patient treatment was commenced [Rep. Tr. 111-112]. By December 8, 1953, substantial improvement was noted. Continuing improvement was noted on December 29, 1953, and on January 12, 1954 [Rep. Tr. 113]. On January 26, 1954, the record notes that the patient is better but will probably not be able to resume long fishing trips; that appellant is handicapped by an artificial leg; and does not believe that he has recovered completely in a three-month period, which is ordinarily sufficient for such injuries. The examining physician, Dr. Halber, concurred with appellant in the opinion that the appellant would not be able to do fishing work [Rep. Tr. 114]. The appellant was continued on the unfit-for-duty list for an additional month, and finally was discharged on February 26, 1954, with the notation: "Maximum hospital benefits. Discharged. Diagnosis: Contusion of muscles." Certificate of discharge was subsequently issued on March 1, 1954, with the notation that appellant was permanently unfit for sea duty [Rep. Tr. 114, line 20 and following].

Appellant received active out-patient treatment for a period of 106 days. After discharge by the United States Public Health Service doctors appellant was referred by his attorney to Dr. Seymour Albans, orthopedic specialist

of Long Beach, California, who first saw appellant on March 8, 1954. Dr. Albans was unable to see any bruise or any result of injury by a careful examination of appellant, nor did he see any evidence of injury in the X-rays, except a disease evidenced by calcium deposits [Rep. Tr. 51, line 3 *et seq.*]. Dr. Albans did find a condition of enlargement of the lymph glands in the vicinity of the right groin which he thought would clear up spontaneously and which was not a matter to be concerned about, and so told appellant. Dr. Albans was advised by appellant of pain over the tail bone. On this point Dr. Albans testified [Rep. Tr. 23, line 16 *et seq.*]:

“Pain in this area, pain over the coccyx, is a very frequent complaint. We see many patients referred to us who have this complaint, and it is a problem always, because usually once this area is complained of, pain lasts a long time. And unfortunately there are many things we can do to help, but there is no certain cure. And I told Mr. Stanovich that I thought we could do things for him that might help. If it didn't, we would discontinue our treatment.”

Dr. Albans proceeded to treat the appellant, using various types and kinds of treatment, some of which treatment appeared to him to be beneficial and some of which appeared to aggravate the condition [Rep. Tr. 27]. Treatment was finally discontinued on August 17, 1954, at which time, according to the doctor, the appellant stated to the doctor that he, the appellant, considered that he was 80 per cent improved [Rep. Tr. 27, line 24] . . . “and when we stopped our therapy, in his words he was 80 per cent improved, he felt.”

The appellant had not been rehabilitated as a fisherman and remained unable to return to his duties as a fisherman [Rep. Tr. 32, line 5 *et seq.*].

From the above brief statement of the case it appears that this appeal is concerned with the sole proposition as to whether the findings of the District Court, based upon conflicting evidence as to when appellees' liability for maintenance and cure should terminate, should be reversed by this court. On the basis of all of the evidence before it, which included United States Public Health Service records, the testimony of the appellant and members of his family including his wife and his niece, and the testimony of Dr. Albans, the trial court found that the appellant had obtained maximum benefits on March 1, 1954, and that subsequent treatments were palliative in nature.

Summary of Argument.

The findings of the trial court were based upon conflicting evidence. The trial court was not bound to accept the appellant's evidence, even assuming that it was not directly contradicted in all respects. Under familiar and well-settled rules, findings of the trial court under the circumstances here existing are presumptively correct and are not to be rejected and reversed.

Argument.

In an appeal in admiralty where all, or substantially all, of the evidence is heard by the trial judge, and the question is one of credibility of witnesses on conflicting testimony, the presumption that the findings by the District Court are correct has very great weight.

Tawada v. United States (C. C. A. 9), 1947 A. M. C. 947, 162 F. 2d 615;

Benedict on Admiralty, 6th Ed., Vol. IV, Sec. 573, and cases cited.

Tawada v. United States, *supra*, appears very close to the present case on its facts. In the *Tawada* case all the evidence, except the United States Public Health Service medical records, was heard by the trial judge. There was a conflict between the libelant's testimony and the Public Health records, particularly as to the libelant's knowledge of facts bearing on his physical condition. This court pointed out that the trial court had evidently rejected the libelant's testimony in certain respects and that the trial court was justified in finding against the libelant on the issue raised.

A similar situation is presented in the case herein. The Public Health records indicate that appellant had attained maximum improvement on February 26, 1954, and formalized its finding by issuing its certificate of discharge on March 1, 1954. The appellant contends to the contrary, and alleges that he continued to receive improvement thereafter. A conflict in the evidence was accordingly created. The findings of the Public Health doctors were opposed to the opinion of the appellant himself. The trial court proceeded to resolve this conflict against the appellant and, as in the *Tawada* case, evidently re-

jected certain portions of the appellant's evidence. The trial court saw and heard the appellant, as well as the appellant's wife, the appellant's niece, and the appellant's doctor to whom appellant had been referred by his attorney. The trial court was in an excellent position to determine what weight to give to all of the testimony before it. As we see it, the appellant's quarrel with the trial court's decision is based entirely upon the proposition that the trial court did not accept the appellant's evidence at the same value which the appellant himself placed upon it. The trial court was not required to accept the appellant's testimony, or that of his doctor, even if such testimony was uncontradicted.

Uncontradicted evidence is not necessarily conclusive in any event.

Elzig v. Gudwangen (C. C. A. 8), 91 F. 2d 434.

This proposition is especially true when directed to evidence which is not susceptible of contradiction, such as the appellant's own opinion or statement as to how he felt. The trial court, in weighing such evidence, is required to look behind the spoken word and consider the interests and biases which may influence it. The trial court was dealing with a purely subjective proposition in attempting to decide how the appellant felt at any particular time, and would be obliged to consider the extent to which the appellant may have exaggerated as well as the extent to which the appellant was trying to build up a case of general and special damages for his civil jury causes of action. The record shows that the appellant was definitely claims conscious. Color photographs were taken of the inside area of the appellant's right thigh within two weeks after the accident and used in the lawsuit [Rep. Tr. 6, *et seq.*, Pltf. Ex. 1]. Normally such pictures are

not taken for purely esthetic purposes, or to be included in the family album. It is apparent that the appellant was considering the possible advantages of a lawsuit quite soon after his accident. The appellant and his family live in San Pedro and had been treated for years by Dr. Dunbar of San Pedro. Dr. Dunbar was never consulted concerning the appellant's condition [Rep. Tr. 66-67]. If it were entirely true that the appellant was suffering such extreme pain during the 106 days of treatment by the Public Health doctors and at the time of his eventual discharge and thereafter, it seems a somewhat strange and inconsistent circumstance that he would not at least talk to Dr. Dunbar about his problem.

As against the appellant's testimony as to how he felt at various times the court was obliged to consider the fact that he had been treated for a period of 106 days by Public Health Service doctors—a period in excess of that normally required in such cases; that the Public Health Service doctors had discharged appellant as having received maximum benefits and that when appellant's new doctor saw appellant a few days later he was unable to find anything objectively wrong. Certainly when all of these factors are considered we cannot understand the contention that the trial court's findings are clearly wrong. To the contrary, we submit that the trial court decided the question on the basis of conflicting evidence and in accordance with the preponderance of all of the evidence which the trial court believed true.

The question of maximum benefits and when liability for maintenance and cure ends is a question of fact.

Tawada v. United States, supra;

Brett v. Carras (C. C. A. 3), 203 F. 2d 451.

It is also a question of fact which is based in part upon opinion. On the one hand we have the opinion of the Public Health doctors, based upon their observations of the appellant as well as upon their general knowledge and experience, and their treatment of similar cases. There would be no reason for the Public Health doctors to deprive the appellant of further reasonable necessary medical care or treatment. No financial considerations or collateral questions of advantage in litigation would be apt to bias their judgment. The Public Health Service facilities are entirely adequate for the treatment of such cases and include physiotherapy equipment and the services of orthopedic consultants [Rep. Tr. 56-57].

On the other hand we have evidence concerning the appellant's statement to Dr. Albans that he felt 80 per cent improved after seeing Dr. Albans. The testimony concerning the 80 per cent improvement was clearly and entirely based upon the appellant's own evaluation and opinion, and not upon the evaluation and opinion of Dr. Albans [Rep. Tr. 27, line 25, and repeated at Rep. Tr. 28-29]. We know that the trial court evaluated all of these matters because they were specifically mentioned in oral argument before the trial court on the submission of the third cause of action. Other courts have held that the findings of a trial court on opinion evidence is especially persuasive.

See:

"The Advance," 1930 A. M. C. 1555, 43 F. 2d 824.

The date when liability for maintenance and cure ends is purely a question of fact. Courts ordinarily use the date of discharge from the Marine Hospital when determining the end of the period of maintenance and cure.

Norris, Law of Seamen, Vol. II, page 179.

In some instances maintenance has extended beyond the date of discharge by the Public Health Service doctors, particularly if the seaman is looking for work and finds employment within a reasonable length of time. Such is not the case here, as the Public Health Service doctors as well as appellant's doctor concurred in the opinion that appellant was permanently unfit for sea duty.

As appellant was unfit for sea duty when discharged by the Public Health Service doctors and remained unfit for sea duty after treatment by his doctor, the trial court correctly described the treatment obtained by appellant after his discharge by the Public Health Service doctors as palliative in nature. It was not treatment designed to restore appellant to a fit-for-duty statute; at the very best it might help him to feel more comfortable. Even on this point appellant's doctor could give no positive assurance [Rep. Tr. 23].

We have re-examined all of the authorities cited by appellant in his brief. We have no quarrel with the propositions of law which are stated in those decisions. Each and every seaman's maintenance and cure case must be decided upon its own particular facts, within the framework of the general principles established in leading cases, such as *Farrell v. United States*, 306 U. S. 511, 93 L. Ed. 850, and this court's decision in *Luksich v. Missetich*, 140 F. 2d 812.

We believe this court's opinion in *Luksich v. Missetich* is of significance in this case. The appellant there contended, just as the appellant here contends, that maintenance should be paid as long as medical treatment was in any way beneficial to him, and for a greater period of time than was allowed by the District Court. The appellant had been allowed maintenance until the time he had

reached a maximum state of recovery as found by the District Court. Appellant was treated by the United States Public Health Service in San Pedro, California, and had not been discharged at the time of trial. The appellant moved this court for an order to take additional proof, to extend the maintenance period. This court said, page 814:

“Other of the affidavits in support of libellant’s motion (for order to take additional proof) refer to his complete recovery from his injury. The purpose to be achieved, obviously, is an extension of time for which maintenance and cure is awarded. However, there is no indication that full recovery resulted from continued and necessary medical treatment, an essential to enlarge the period during which libellant is entitled to compensation. Therefore, no good cause is shown for the taking of the testimony in question, and the motion is denied insofar as it relates to such evidence.”

Applying the rule of *Luksich v. Missetich* to this case we find that even if the trial court had accepted all of the appellant’s evidence at the full value appellant places upon it the appellant’s proof would still have been insufficient. The appellant and his doctor contend that full recovery was not accomplished; that appellant remained unfit for duty, suffered continued pain, and might need an operation [Rep. Tr. 33-34].

We think this is a case where the appellant is attempting to recover damages for pain and suffering under the label of maintenance and cure. The words of the Supreme Court in *Farrell v. United States*, *supra*, 306 U. S. at 519, appear to be appropriate:

“Maintenance and cure is not the only recourse of the injured seaman. In an appropriate case he may

obtain indemnity or compensation for injury due to negligence or unseaworthiness and may recover, by trial before court and jury, damages for partial or total disability. But maintenance and cure is more certain if more limited in its benefits. It does not hold a ship to permanent liability for a pension, neither does it give a lump-sum payment to offset disability based on some conception of expectancy of life. Indeed the custom of providing maintenance and cure in kind and concurrently with its need has had the advantage of removing its benefits from danger of being wasted by the proverbial improvidence of its beneficiaries. The government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it."

In this case the appellant presented his claims for indemnity for negligence and unseaworthiness to a jury. The jury was fully advised as to the appellant's claims for permanent and partial disability, loss of wages, and pain and suffering, and rendered their verdict accordingly, and in appellant's favor, for \$6,500.00. It must be presumed that the appellant was fully and fairly dealt with in so far as any pain and suffering was proved, either before or after March 1, 1954. We do not think it is sound law to undertake to upset the trial court's findings, fully and fairly arrived at, in order to extend liability for maintenance and cure to cover the nebulous type of situation here presented. Certainly it would be possible for any injured seaman, after being discharged by the Public Health Service or by any other medical facility, to shop around until he found a doctor who would undertake additional treatment which might prove beneficial both to the patient and to the doctor. We believe that it

is sound policy and sound law to require that an end be written to each incident at some reasonable time which is objectively determined. No more satisfactory method of resolving such incidents has been suggested to date than the method of a trial upon the facts and a finding thereon by the trial judge. We submit that an examination of the record in this case will establish that the appellant has received complete justice, and that no good reason exists for disturbing the result reached in the trial court.

Conclusion.

We accordingly submit that the judgment of the District Court on the third cause of action should be affirmed.

Respectfully submitted,

ALLAN F. BULLARD,

Attorney for Defendants-Appellees.

No. 14785

United States
Court of Appeals
for the Ninth Circuit

WEYL-ZUCKERMAN & COMPANY,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

OCT 11 1955

PAUL P. O'BRIEN, CLERK

No. 14785

United States
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WEYL-ZUCKERMAN & COMPANY,
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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Counsel for Respondent.

The Tax Court of the United States

Docket No. 43504

WEYL-ZUCKERMAN & COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1952

Aug. 18—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 20—Copy of petition served on General Counsel.

Aug. 18—Request for Circuit hearing in San Francisco, Calif., filed by taxpayer. Granted—9/2/52.

Sept. 30—Answer filed by General Counsel.

Oct. 8—Copy of answer served on taxpayer—San Francisco, Calif.

1953

Dec. 22—Hearing set March 22, 1954, San Francisco, Calif.

1954

Mar. 17 and 18—Hearing had before Judge Raum on the merits. Stipulation of Facts and exhibits 1A through 2B, filed at hearing. Petitioner's Brief due 5/3/54; Respondent's Brief due 6/2/54; Petitioner's Reply due 6/22/54.

Apr. 5—Transcript of Hearing 3/17/54 filed.

1954

Apr. 5—Transcript of Hearing 3/18/54 filed.

May 3—Brief filed by taxpayer. Copy served.

June 2—Brief in answer filed by General Counsel.

6/3/54—Copy served.

June 17—Motion for extension of time to July 22, 1954 to file reply brief filed by taxpayer. Granted—6/17/54.

July 15—Motion for extension of time to Aug. 22, 1954 to file reply brief filed by taxpayer. Granted—7/16/54.

Aug. 25—Reply brief filed by taxpayer. Copy served —8/26/54.

1955

Feb. 14—Findings of Fact and Opinion filed, Judge Raum, Decision will be entered for the respondent. Copy served 2/14/55.

Feb. 15—Decision entered. Judge Raum, Div. 11.

May 11—Petition for review by U.S. Court of Appeals for the Ninth Circuit with assignments of error filed by taxpayer.

May 13—Proof of Service filed.

May 13—Designation of Contents of record with affidavit of service by mail attached, filed.

May 23—Designation for Additional Portions of Record with proof of Service by mail thereon, filed by General Counsel.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IRA:90-D:HVH (C:AS:PD SF:HGP), dated May 22, 1952, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation organized under the laws of the State of California, with its principal office at 146 West Weber Avenue, Stockton 2, California. The returns for the periods here involved were filed with the Collector of Internal Revenue for the First District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on May 22, 1952.

3. The Commissioner determined an overassessment in income tax for the calendar year 1946 in the amount of \$6,773.28 and a deficiency in income tax for the calendar year 1947 in the amount of \$66,082.54; of these amounts the following are in controversy:

Year	Amount	
1946	\$11,843.60	Overassessment
1947	57,363.75	Deficiency

4. The determination of taxes set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in holding by implication that petitioner was the owner of mineral rights on the property known as Henning Tract at all times prior to December 21, 1946.

(b) The Commissioner erred in holding that the petitioner had not received from its wholly-owned subsidiary, McDonald Island Farms, Ltd., on December 21, 1946 a dividend in kind, consisting of certain mineral and gas rights, which had a fair market value of \$230,000.00.

(c) The Commissioner erred in failing to hold that up until December 21, 1946 McDonald Island Farms, Ltd., was the owner of said mineral rights; that on December 21, 1946 McDonald Island Farms, Ltd. declared a dividend in kind consisting of said rights and transferred them to petitioner; that on said date petitioner received said rights as such dividend; and that on said date said rights had a fair market value of \$230,000.00.

(d) As a result of the error assigned in subparagraph (a) above, the Commissioner erred in determining that the petitioner's royalty income for the calendar year 1946 should be increased in the amount of \$5,602.08.

(e) As a result of the errors assigned in subparagraphs (a) and (d) above, the Commissioner erred in determining that the petitioner was entitled to an additional allowance for depletion for the calendar year 1946 in the amount of \$1,136.42.

(f) As a result of the errors assigned in subparagraphs (b) to (e) above, inclusive, the Commis-

sioner erred in determining that the petitioner had additional long-term capital gain income for the calendar year 1947 in the amount of \$229,455.00 from the sale of its mineral and gas rights.

(g) The Commissioner erred in determining a deficiency against the petitioner for the calendar year 1947 and an overassessment on the petitioner for the calendar year 1946.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) At all times from June 27, 1946 to December 21, 1946, McDonald Island Farms, Ltd., a corporation, hereinafter called McDonald Ltd., was the owner in fee simple of the property located in the Delta District of the San Joaquin River in San Joaquin County, known as Henning Tract.

(b) On December 21, 1946, McDonald Ltd. declared a dividend of all mineral rights on said Henning Tract. Said mineral rights are those which are involved in the determination of the Commissioner as hereinabove set forth. On said date petitioner was the owner of all the issued and outstanding stock of McDonald Ltd. and pursuant to said dividend McDonald Ltd. conveyed said rights to petitioner.

(c) Said dividend was declared and said conveyance was made in the regular course of business of McDonald Ltd. and for valid and legitimate business purposes.

(d) Petitioner reported said dividend in its income tax return for the year 1946 at a fair mar-

ket value thereof, to wit, \$230,000, and paid taxes thereon.

(e) On January 20, 1947 petitioner sold to Pacific Oil Company (California), a corporation, a portion of said mineral rights. Said sale was a part of the transaction involving the sale of mineral rights on other property. The total purchase price of all of said mineral rights was \$609,514.46. The portion of said purchase price allocated to the mineral rights received by petitioner as such dividend was \$230,000.00.

(f) No gain resulted from the sale of said mineral rights on Henning Tract.

Wherefore, the petitioner prays that the Court may hear the proceeding and determine:

(1) That at all times from June 27, 1946 to December 21, 1946 McDonald Island Farms, Ltd. was the owner in fee simple of the property known as Henning Tract.

(2) That the petitioner received from McDonald Island Farms, Ltd. on December 21, 1946 a dividend in kind of certain mineral rights which had a fair market value of \$230,000.00.

(3) That the petitioner did not have additional royalty income for the year 1946, and likewise was not entitled to an additional allowance for depletion for that year.

(4) That the petitioner did not have additional capital gain income from the sale of its mineral rights in the year 1947.

(5) That there is no overassessment due to peti-

tioner for the year 1946 and that there is no deficiency due by petitioner for the year 1947.

Respectfully submitted,

/s/ DAVID LIVINGSTON,

/s/ P. K. WEBSTER,

Counsel for Petitioner

August 12, 1952, San Francisco, California.

Duly Verified.

EXHIBIT "A"

U. S. Treasury Department, Office of Internal Revenue Agent in Charge, 74 New Montgomery St., San Francisco 5, California May 22, 1952

San Francisco IRA:90-D:HVH (C:AS:PD SF: HGP)

Weyl-Zuckerman & Company

146 West Weber Avenue, Stockton 4, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947 discloses a deficiency of \$66,082.54, and that the determination of your income tax liability for the taxable years ended December 31, 1944 and December 31, 1946 discloses an overassessment of \$6,795.23, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of

this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office for the attention of IRA:90-D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner,

/s/ By F. M. HARLESS,
Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Agreement
Form.

Statement

Tax Liability for the Taxable Years Ended December 31, 1944, December 31, 1946 and December 31, 1947.

Year Ended	Liability	Assessed	Over- assessment	Deficiency
Income Tax				
Dec. 31, 1944	\$ 78,843.26	\$ 78,865.21	\$ 21.95	
Dec. 31, 1946	20,543.45	27,316.73	6,773.28	
Dec. 31, 1947	114,051.49	47,968.95		\$66,082.54
Totals	\$213,438.20	\$154,150.89	\$6,795.23	\$66,082.54
Excess Profits Tax				
Dec. 31, 1944	None	None	None	None

In making this determination of your income and excess profits tax liability, careful consideration has been given to your protest filed January 9, 1950; to the statements made at the conferences held on March 7, 1950 and December 14, 1951; and to your claims for refund filed on May 26, 1947, July 29, 1949 and June 28, 1950 for the year 1944 and your claim for refund filed on June 28, 1950 for the year 1946.

It is noted that on August 11, 1949 you filed an application for relief under section 722 of the Internal Revenue Code for the year 1944 on form 991. The entire amount of excess profits tax disclosed by your 1944 excess profits tax return was the subject of an overassessment based on allowance of an excess profits credit carry-back from the year 1946 as claimed on forms 843 and 1139 filed by you on May 26, 1947. Since you have no excess profits tax liability for the year 1944, form 991 filed by you does not constitute a claim for refund.

The overassessment shown herein for the year 1946 should not be regarded as finally determined. When final determination has been made, the overassessment, to the extent of the amount allowable, will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with section 322(a) of the Internal Revenue Code.

A copy of this letter and statement has been mailed to your representative, Mr. P. K. Webster, Haskins and Sells, 155 Montgomery Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJUSTMENTS TO NET INCOME

Year: 1944

Net income for declared value excess profits tax computation as disclosed by return.....	\$210,648.69
Nontaxable income and additional deductions:	
(a) California franchise tax.....	54.89
<hr/>	
Net income for declared value excess profits tax computation as adjusted	\$210,593.80

EXPLANATION OF ADJUSTMENTS

- (a) An additional deduction of \$54.89 for California franchise tax is allowed as follows:

Increase in 1943 income due to adjustment of	
Capital Stock tax	\$ 1,875.00
Percentage of business done within the State of	
California as disclosed by your franchise tax return	86.11%
86.11% of \$1,875.00	\$ 1,614.56
Franchise tax—85% of 4% of \$1,614.56 or.....	\$ 54.89

COMPUTATION OF DECLARED VALUE EXCESS PROFITS
TAX—Year: 1944

Net income for declared value excess profits tax computation	\$210,593.80
Less: 10% of \$3,000,000.00, value of capital stock as declared in your capital stock tax return for the year ended June 30, 1944.....	\$300,000.00
Dividends received credit	11,050.00 311,050.00
<hr/>	
Balance subject to declared value excess profits tax.....	None
Total declared value excess profits tax assessable.....	None
Total declared value excess profits tax assessed:	
Original, Account No. 410451, June 1945 list,	
First California District	None
<hr/>	
Deficiency or overassessment of declared value excess profits tax	None

COMPUTATION OF TAX
Year: 1944

Net income for declared value excess profits tax computation	\$210,593.80
Less: Dividends received credit	11,050.00
<hr/>	
Normal tax and surtax net income.....	\$199,543.80
Alternative tax:	
Normal tax and surtax net income.....	\$199,543.80
Less: Net long-term capital gain.....	6,495.06
<hr/>	
Adjusted normal tax and surtax net income.....	\$193,048.74
Normal tax at 24% on \$193,048.74.....	\$ 46,331.70
Surtax at 16% on \$193,048.74.....	30,887.80
<hr/>	
Total normal tax and surtax.....	\$ 77,219.50
Add: 25% of net long-term capital gain.....	1,623.76
<hr/>	
Alternative tax	\$ 78,843.26
Tax at ordinary rates:	
Normal tax at 24% on \$199,543.80.....	\$ 47,890.51
Surtax at 16% on \$199,543.80.....	31,927.01
<hr/>	
Income tax at ordinary rates.....	\$ 79,817.52

Income tax liability (alternative tax).....	\$	78,843.26
Income tax assessed:		
Original, Account No. 410451, June 1945 list		
First California District	\$47,610.94	
Additional, July 25, 1947		
Special List No. 7.....	31,254.27	78,865.21
		<hr/>
Overassessment of income tax.....	\$	21.95

EXCESS PROFITS NET INCOME

Year: 1944

Excess profits net income under the income credit method, as disclosed by your return.....	\$191,153.63	
Nontaxable income and additional deductions:		
Additional California franchise tax as disclosed by the foregoing		54.89
		<hr/>
Excess profits net income under the income credit method, as adjusted	\$191,098.74	

COMPUTATION OF EXCESS PROFITS TAX

Year: 1944

Excess profits net income.....	\$191,098.74	
Less: Specific exemption	\$ 10,000.00	
Excess profits credit, under the income credit method, as disclosed by your return	103,017.96	
Unused excess profits credit carry-back (under the income credit method) as disclosed by claim filed July 29, 1949	102,595.67	215,613.63
		<hr/>
Adjusted excess profits net income.....		None
Excess profits tax liability.....		None
Excess profits tax assessed:		
Original, Account No. 400335, June 1945 list		
First California district	\$ 66,806.00	
Less: Tentative allowance.....	66,806.00	None
		<hr/>
Deficiency or overassessment of excess profits tax.....		None

ADJUSTMENTS TO NET INCOME

Year: 1946

Net income as disclosed by return.....	\$458,579.97
Unallowable deductions and additional income:	
(a) Depreciation allowance decreased \$ 13,342.94	
(b) Royalty income increased.....	5,602.08 18,945.02
Total	\$477,524.99
Nontaxable income and additional deductions:	
(c) Depletion increased	\$ 1,136.42
(d) Dividends	230,000.00 231,136.42
Net income as adjusted	\$246,388.57

EXPLANATION OF ADJUSTMENTS

(a) The depreciation allowance is decreased \$13,342.94 as follows:

	As Disclosed By Return	As Adjusted
Farm buildings, Utah.....	\$ 523.47	\$ 435.79
Potato cellar, Utah.....	2,926.65	1,624.29
Potato cellar, Hosley.....	1,795.86	996.70
Office building, Stockton.....	250.00	125.00
Farm implements, Hosley.....	4,831.90	2,174.35
Farm implements, Utah.....	14,225.01	6,401.25
Machine shop equipment, Utah.....	1,094.86	547.43
Total	\$ 25,647.75	\$ 12,304.81
Depreciation disclosed by return.....		\$ 25,647.75
Depreciation as adjusted		12,304.81
Decrease in depreciation allowance		\$ 13,342.94

(b) Your taxable income is increased \$5,602.08 representing your share of royalty income from the Henning Tract for the period June 26, 1946 to December 20, 1946.

(c) Depletion allowance is increased \$1,136.42 as follows:

Amount allowed	\$ 18,688.21
Amount claimed on your return.....	17,551.79
Increase	\$ 1,136.42

(d) You included in dividend income for the year 1946 the amount of \$230,000.00 alleged to be the fair market value of mineral and gas rights reported by you as received in 1946. (See explanation of adjustments for the year 1947.) Dividend income for the year 1946 is decreased by this amount.

COMPUTATION OF INCOME TAX

Year: 1946

Net income	\$246,388.57		
Less: Dividends received credit.....	187,000.00		
<hr/>			
Normal tax and surtax net income.....	\$ 59,388.57		
Alternative tax:			
Normal tax and surtax net income.....	\$ 59,388.57		
Less: Excess of net long-term capital gain over net short-term capital loss.....	12,258.88		
<hr/>			
Adjusted normal tax and surtax net income.....	\$ 47,129.69		
Normal tax:			
Tax at 15% on	\$ 5,000.00	\$ 750.00	
Tax at 17% on	15,000.00	2,550.00	
Tax at 19% on	5,000.00	950.00	
Tax at 31% on	22,129.69	6,860.20	
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Tax on	\$47,129.69	\$11,110.20	\$ 11,110.20
Surtax:			
Tax at 6% on	\$25,000.00	\$ 1,500.00	
Tax at 22% on	22,129.69	4,868.53	
<hr/>			
Tax on	\$47,129.69	\$ 6,368.53	6,368.53
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Normal tax and surtax.....	\$ 17,478.73		
Add: 25% of net long-term capital gain.....	3,064.72		
<hr/>			
Alternative tax	\$ 20,543.45		
Tax at ordinary rates:			
Normal tax at 24% on \$59,388.57.....	\$ 14,253.26		
Surtax at 14% on \$59,388.57.....	8,314.40		
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Income tax at ordinary rates.....	\$ 22,567.66		
Income tax liability (alternative tax).....	\$ 20,543.45		

Income tax assessed:

Original, Account No. 410418

June 1947 list

First California District..... 27,316.73

Overassessment of income tax.....\$ 6,773.28

ADJUSTMENTS TO NET INCOME

Year: 1947

Net income as disclosed by return.....\$210,502.58

Unallowable deductions and additional income:

(a) Depreciation allowance decreased \$ 16,450.56

(b) Long-term capital gain..... 229,455.00 245,905.56

Net income as adjusted.....\$456,408.14

EXPLANATION OF ADJUSTMENTS

(a) The depreciation allowance is decreased \$16,450.56 as follows:

	As Disclosed By Return	As Adjusted
Farm buildings, Utah	\$ 4,599.50	\$ 3,829.08
Potato cellar, Utah	6,082.02	3,375.52
Potato cellar, Hosley	1,795.86	996.70
Office building, Stockton	250.00	125.00
Farm implements, California	37.08	16.69
Farm implements, Hosley	4,935.82	2,221.12
Farm implements, Utah	15,818.32	7,118.24
Machine shop equipment, Utah.....	1,228.61	614.30
Totals	\$ 34,747.21	\$ 18,296.65
Depreciation as disclosed by return.....		\$ 34,747.21
Depreciation as adjusted		18,296.65
Decrease in depreciation allowance.....		\$ 16,450.56

(b) It is held that in the determination of long-term capital gain from the sale of mineral and gas rights in 1947, the corrected gain properly reportable is \$386,513.63 instead of the amount

of \$157,058.63 reported in your return. The corrected gain of \$386,513.63 is computed as follows:

Gross sales price of mineral and gas rights.....\$609,514.46

Cost of mineral and gas rights sold:

Cost of McDonald Tract:

Dividend acquired March 13, 1946 \$120,000.00

Acquired by purchase from Holly

Sugar Corporation 118,666.28

Total cost\$238,666.28

Less: Depletion allowable 15,665.45

Net cost of McDonald Tract.....\$223,000.83

Cost of Henning Tract..... None 223,000.83

Long-term capital gain corrected.....\$386,513.63

Long-term capital gain reported..... 157,058.63

Increase in long-term capital gain.....\$229,455.00

In the determination of the above gain, the dividend in kind—mineral and gas rights—supposedly received by you on or about December 26, 1946, from your wholly-owned subsidiary, McDonald Island Farms, Ltd., at an asserted fair market value of \$230,000.00 has not been considered as a part of the cost basis.

In your return you reported the gross sales price as \$379,514.46 whereas the amount should have been \$609,514.46, or an understatement of \$230,000.00.

COMPUTATION OF INCOME TAX

Year: 1947

Net income\$456,408.14

Less: Dividends received credit..... 19,125.00

Normal tax and surtax net income.....\$437,283.14

Alternative tax:

Normal tax and surtax net income.....\$437,283.14

Less: Excess of net long-term capital gain over net

short-term capital loss 393,602.03

Adjusted normal tax and surtax net income.....\$ 43,681.11

Normal tax:

Tax at 15% on	\$ 5,000.00	\$ 750.00
Tax at 17% on	15,000.00	2,550.00
Tax at 19% on	5,000.00	950.00
Tax at 31% on	18,681.11	5,791.14

Normal tax on	\$43,681.11	\$10,041.14	\$ 10,041.14
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Surtax:

Tax at 6% on	\$25,000.00	\$ 1,500.00
Tax at 22% on	18,681.11	4,109.84

Surtax on	\$43,681.11	\$ 5,609.84	5,609.84
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Total normal tax and surtax.....	\$ 15,650.98
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Add: 25% of capital gain.....	98,400.51
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Alternative tax	\$114,051.49
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Tax at ordinary rates:

Normal tax at 24% on \$437,283.14.....	\$104,947.95
Surtax at 14% on \$437,283.14.....	61,219.64

Income tax at ordinary rates.....	\$166,167.59
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Income tax liability (alternative tax).....	\$114,051.49
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Income tax assessed:

Original, Account No. 4101448

First California District	47,968.95
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Deficiency in income tax.....	\$ 66,082.54
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[Endorsed]: T.C.U.S. Filed August 18, 1952.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above-named, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed

by the above-named petitioner, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Denies that taxes for the year 1946 are in controversy in this proceeding; admits the remaining allegations contained in paragraph 3 of the petition.

4. (a) through (g). Denies the allegations of error contained in subparagraphs (a) through (g) of paragraph 4 of the petition.

5. (a) Denies the allegations of fact contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits that on December 21, 1946, petitioner was the owner of all the issued and outstanding stock of McDonald Ltd.; denies the remaining allegations of fact contained in subparagraph (b) of paragraph 5 of the petition.

(c) Denies the allegations of fact contained in subparagraph (c) of paragraph 5 of the petition.

(d) Admits that petitioner reported on its 1946 income tax return a dividend from McDonald Ltd.; for lack of sufficient information upon which to form a belief as to the correctness thereof, respondent denies the remaining allegations of fact contained in subparagraph (d) of paragraph 5 of the petition.

(e) Admits the first three sentences contained in subparagraph (e) of paragraph 5 of the petition;

denies the remaining allegations of fact contained therein.

(f) Denies the allegations of fact contained in subparagraph (f) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES W. DAVIS,

Chief Counsel, Bureau of Internal
Revenue

Of Counsel: B. H. Neblett, District Counsel; T. M. Mather, Charles W. Nyquist, Special Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed September 30, 1952.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between the parties hereto, acting through their respective counsel, that the facts hereinafter set forth shall be taken as true for purposes of this proceeding; provided, however, that this stipulation shall be without prejudice to the rights of the parties hereto to introduce other and further evidence not inconsistent with the facts herein stipulated and to

object to the materiality or relevancy of any of the facts stipulated:

1. McDonald Island is located in the Delta Region of the San Joaquin River in San Joaquin County, California, approximately ten miles northwest of the City of Stockton. The island comprises and at all times involved in this controversy has comprised two tracts; a slough which forms a natural dividing line runs between the tracts. One tract contains approximately 2,700 acres and is known as the Henning Tract; the other contains approximately 3,400 acres and is known as the McDonald Tract. Substantially all of said island is farming land and has been farmed year after year. In 1935 presence of gas under the surface of said island was indicated and wells were brought into production in 1937.

2. Weyl-Zuckerman & Co., the petitioner, hereinafter called "Weyl", was organized in 1907 as a California corporation. The Henning tract was acquired by Weyl prior to 1932.

3. For many years prior to 1943 the McDonald Tract was owned by McDonald Island Farms, Ltd., a California corporation, hereinafter called "McDonald Ltd."

4. At the time of the incorporation of McDonald Ltd. and for some years thereafter until the year 1931 neither Weyl nor any of its shareholders had any interest in McDonald Ltd. In 1931 three members of the Zuckerman family purchased one-half of the outstanding shares of McDonald Ltd. and

Holly Sugar Corporation, hereinafter called "Holly", purchased the remaining one-half thereof. Later in 1934 the Zuckermans transferred their shares to Weyl in consideration for shares of Weyl.

5. As of August 11, 1943, McDonald Ltd. declared a dividend in kind to its stockholders, as a result of which Weyl and Holly each received a one-third ($\frac{1}{3}$) interest in the surface rights of the McDonald Tract, McDonald Ltd. retaining the remaining one-third ($\frac{1}{3}$) of the surface rights and all of the mineral rights. As of about the same date Holly gave Weyl an option to purchase Holly's said one-third ($\frac{1}{3}$) interest in said surface rights for \$120,-280.30. Said option was transferred to Zuckerman Potato Co., a partnership, which exercised it and Holly conveyed to Zuckerman Potato Co. on December 27, 1944.

6. As of March 13, 1946, McDonald Island Farms declared a dividend in kind of the mineral rights in the McDonald Tract; Weyl and Holly each received a 50% interest in said mineral rights. At the same time Holly gave Weyl an option to purchase Holly's said 50% interest in the McDonald Tract mineral rights for \$120,000. As of the same date Weyl purchased Holly's 50% of the capital stock of McDonald Ltd., and thereby became owner of all of McDonald Ltd.'s outstanding capital stock.

7. As of June 5, 1946, Weyl exercised its option to purchase Holly's 50% interest in the mineral rights in the McDonald Tract.

8. Attached hereto and marked Exhibits 1-A and 2-B are photostatic copies of the corporation in-

come tax returns of the petitioner for the taxable years 1946 and 1947.

/s/ DAVID LIVINGSTON,

Counsel for Petitioner

/s/ DANIEL A. TAYLOR,

Chief Counsel, Internal Revenue
Service,

Counsel for Respondent

[Endorsed]: T.C.U.S. Filed March 17, 1954.

[Title of Tax Court and Cause.]

FINDINGS OF FACT AND OPINION

Filed February 14, 1955.

Petitioner owned a tract of land with valuable mineral rights. The mineral rights had a zero basis. Petitioner transferred the entire property to a wholly-owned subsidiary, and, after having arranged to sell a portion of these rights, petitioner reacquired the mineral rights from the subsidiary as a dividend in kind. It then consummated the sale. Held, in the circumstances of this case, that petitioner intended from the outset to reacquire the mineral rights from the subsidiary for purposes of sale, that the transfer of the mineral rights to the subsidiary was without business purpose and was lacking in bona fides, and that the reacquisition of the mineral rights by petitioner from the subsidiary did not result in a stepped-up basis.

David Livingston, Esq., and Louis F. DiResta, C.P.A., for the petitioner.

Charles W. Nyquist, Esq., for the respondent.

Respondent determined a deficiency in the income tax of petitioner for the year 1947 in the amount of \$66,082.54.

The sole question is whether, in determining petitioner's basis for gain or loss of gas rights in a tract of land known as the Henning Tract, transactions involving a transfer of these rights by petitioner to a wholly owned subsidiary in June of 1946 and a reconveyance back to petitioner in December of 1946 should be disregarded as being without substance or business purpose.

Findings of Fact

Petitioner, a California corporation (hereinafter referred to as "Weyl"), was organized in 1907. Its principal office was located in Stockton, California. Its income tax return for the year 1947 was filed with the collector of internal revenue for the first district of California.

McDonald Island is located in the Delta Region of the San Joaquin River in San Joaquin County, California, approximately ten miles northwest of the city of Stockton. The island comprises and at all times involved in this controversy has comprised two tracts. A slough which forms a natural dividing line runs between the tracts. One tract contains approximately 2,700 acres and is known as the Henning Tract; the other contains approximately 3,400 acres and is known as the McDonald Tract. Sub-

stantially all of this island is farming land and has been farmed year after year. In 1935 presence of gas under the surface of the island was indicated and wells were brought into production in 1937.

The Henning Tract was acquired by Weyl in 1912 at a cost of \$338,375. For many years prior to 1943 the McDonald Tract was owned by McDonald Island Farms, Ltd., a California corporation, hereinafter referred to as "McDonald Ltd."

Prior to the year 1931 neither Weyl nor any of its shareholders had any interest in McDonald Ltd. In 1931 three members of the Zuckerman family purchased one-half of the outstanding shares of McDonald Ltd. and Holly Sugar Corporation, hereinafter referred to as "Holly", purchased the remaining one-half interest. Later, in 1934, the Zuckermans transferred their shares to Weyl in consideration for shares of Weyl.

On November 18, 1935, Weyl leased the mineral rights in the Henning Tract to Standard Oil Company of California, and McDonald Ltd. similarly leased to Standard Oil Company of California the mineral rights in McDonald Tract.

Weyl and Holly disagreed both as to the farming activities on McDonald Tract and also as to fiscal matters. Upon the insistence of Holly a dividend in kind was declared on August 11, 1943 by McDonald Ltd. The subject of this dividend was a two-thirds interest in the surface rights of McDonald Tract. Holly received a one-third interest, and Weyl received a one-third interest. McDonald Ltd., retained the remaining one-third undivided inter-

est. McDonald Ltd. also continued to own the mineral rights in the McDonald Tract.

Weyl's consent to the dividend was given on condition that Holly give Weyl an option to purchase for \$120,280.30 the one-third interest to be acquired by Holly as the result of the dividend. Holly executed an option agreement.

The option was transferred by Weyl to the Zuckerman Potato Company, a partnership. The members of this partnership were stockholders and employees of Weyl. It was formed in 1942 for the purpose of farming leased lands in Oregon. On December 27, 1944, the partnership exercised the option and received from Holly its one-third interest in the surface rights of the McDonald Tract.

Petitioner had been having disagreements with Standard Oil Company in connection with apportionment of royalties and drilling of offset wells, as more fully hereinafter set forth. There appeared to be two possible solutions: the purchase of the gas rights by Standard or the institution of litigation to resolve the differences. In November of 1945, Standard Oil Company made an offer to Maurice Zuckerman, president of Weyl, of \$500,000 for gas rights underlying both the Henning and McDonald Tracts. This offer was regarded as too low; it was not accepted.

In January 1946, Holly urged that McDonald Ltd. declare a dividend in kind to its shareholders of the mineral rights in the McDonald Tract. The board of directors of McDonald Ltd. at a meeting on January 22, 1946, concluded that "a dividend in

kind at this time of the mineral rights * * * might not be for the best interests of the corporation and its shareholders", and adopted a resolution that the mineral rights "be retained by the corporation until such time in the future when this Board of Directors may deem it advantageous and for the best interests of the corporation and its shareholders that such dividend be declared." Holly renewed its request at a meeting of the directors on March 8, 1946. Weyl consented to the declaration of the dividend on the condition that Holly give it an option to buy its share of the dividend. On March 11, 1946, the Commissioner of Corporations of the State of California approved an application filed for permission to make the dividend. On March 13, 1946, McDonald Ltd. declared the dividend and Weyl and Holly each received a 50 per cent interest in the mineral rights on the McDonald Tract. At the same time Holly gave Weyl an option to purchase Holly's 50 per cent interest in the McDonald Tract mineral rights. On the same day Holly also sold to Weyl its 50 per cent of the capital stock of McDonald Ltd., and Weyl thereby became owner of all of the outstanding stock of McDonald Ltd.

On June 5, 1946, Weyl exercised the option to purchase Holly's one-half interest in the mineral rights in the McDonald Tract. Upon the exercise of this option Weyl became the owner of all the mineral rights in this tract and had a cost basis for them of \$238,666.28.

At the regular meeting of the board of directors of Weyl on May 1, 1946, a resolution was adopted

authorizing its president or vice president to endorse a promissory note of McDonald Ltd. payable to the Bank of America in the amount of \$720,000 and guarantee payment of this note.

A promissory note, dated May 20, 1946, was executed by McDonald Ltd. It provided for the payment of \$720,000 in installments prior to May 20, 1956. McDonald Ltd. also executed a deed of trust, dated May 20, 1946, "on the property of the corporation commonly known as the Henning Tract and McDonald Tract located on McDonald Island * * *" to secure payment of the note. The deed, which was acknowledged on June 27, 1946, specifically excepted from its provisions "All minerals, mineral substances, mineral interests, ores, oil, gas, asphaltum and other hydrocarbons lying in or under the Henning and McDonald Tracts."

In a letter dated June 15, 1946 to the Bank of America National Trust and Savings Association, McDonald Ltd. applied for a loan of \$720,000 "to be evidenced by a promissory note dated May 20, 1946". This letter stated when payments would be made; that payment of the note was to be secured by deed of trust, and that—

The undersigned hereby agrees that on or before the 1st day of April 1947, and annually thereafter, additional payments on account of principal of said loan will be made to said Bank in a sum equivalent to the difference between the minimum payment of Twenty-Eight Thousand Eight Hundred and 00/100 (\$28,800.00) Dollars as provided for in said note

and 35% of the net profits of the corporation for the prior fiscal year; net profits as here used shall mean profits before depreciation, but after provision for Income Taxes.

The lower left-hand corner of the letter contains the notation in writing "Accepted Julius Blum, Vice Pres. Bank of America N.T.&S.A. Stockton, Calif."

On or about June 15, 1946, Weyl purchased from the partnership, Zuckerman Potato Co., its one-third interest in the surface rights of the McDonald Tract for which Weyl paid cash at the time. No deed was ever executed for this transfer. On June 27, 1946, Weyl sold a two-thirds interest in the surface rights in the McDonald Tract to McDonald Ltd., and it so entered the sale on its books. The conveyance with respect to one-third of the surface rights was made directly from the partnership to McDonald Ltd. by deed executed on June 27, 1946.

The Henning Tract had a cost to petitioner of \$338,375, but its value had been written up on petitioner's books, so that in June of 1946 it was carried on these books at a value of \$811,750. The mineral rights in this tract had no cost basis to petitioner. On June 27, 1946, Weyl conveyed to McDonald Ltd. the entire fee of the Henning Tract, including surface and mineral rights. This was entered on petitioner's books as a sale for \$338,375 and a book loss of \$473,375 was written off to surplus. The amounts entered on petitioner's books as sales price of Henning Tract (\$338,375) and as sales price for two-thirds of the McDonald Tract surface rights (\$226,-

843.22) were less than their fair market value on June 27, 1946.

In July of 1946, Maurice Zuckerman, the then president of Weyl, went to the offices of the Standard Oil Company and offered to sell the gas rights in both tracts for \$875,000; on the same day he later indicated that he would be willing to reduce the figure to \$820,000. Standard Oil rejected this offer in August of 1946.

Henning Tract and McDonald Tract were portions of a single gas field which also included two other properties in the vicinity one of which was owned by Mayberry and the other by Tilden. As gas was withdrawn from the field the Standard Oil Company determined the percentage to be allocated to each of the four properties and paid royalties on that basis. A dispute arose between Standard Oil and Weyl as to its allotment and also as to whether Standard Oil Company was obligated to drill an offset well on the McDonald Tract after it had drilled a well on the Mayberry property. Differences between petitioner and Standard had existed for several years. Standard's offer to purchase the gas rights for \$500,000 in November of 1945 was an effort to solve the problem in that manner. At the time of Standard's rejection of the \$820,000 offer in 1946, John Zuckerman informed Standard's representative that Weyl was making preparations to institute suit.

On December 12, 1946, John Zuckerman, then manager of Weyl and president and manager of

McDonald Ltd., conferred with the Standard Oil representative. He told the representative that they did not like to sue and would like to sell their interests in the gas rights. At that meeting a basis for determining a sales price for the mineral rights in both tracts was discussed.

On December 16, 1946, a price for the sale of gas rights underlying both the Henning and McDonald Tracts was agreed upon between representatives of Standard Oil Company and the petitioner, subject to ratification by their superiors. However, prior to the consummation of the sale, the board of directors of McDonald Ltd., on December 21, 1946, adopted a resolution declaring a dividend in kind of the mineral rights in the Henning Tract. By deed dated December 21, 1946 (recorded January 10, 1947) McDonald Ltd. conveyed these mineral rights to Weyl. It was of no importance to Standard whether title to the gas rights underlying the Henning Tract was conveyed directly by McDonald Ltd., or in some other manner, and Standard had prepared papers which were intended to consummate the sale. However, petitioner's counsel desired that the conveyance take a different route, and the route adopted—involving a transfer of mineral rights underlying the Henning Tract from McDonald Ltd. to Weyl, followed by a conveyance of gas rights underlying both tracts from Weyl to the buyer—was in accordance with the plan proposed by petitioner and the papers subsequently submitted by petitioner's counsel.

Standard elected to take title in the name of a

subsidiary, Pacific Oil Company, and, on January 20, 1947, a deed to Pacific Oil Company of gas rights in McDonald Tract and Henning Tract, reserving oil, asphaltum, minerals and hydrocarbons other than gas, and also reserving gas rights below a specified depth, was executed and acknowledged by Weyl.

On Weyl's 1946 Federal income tax return it reported the receipt of a dividend of the mineral rights underlying Henning Tract at a fair market value of \$230,000, and claimed a dividend received credit.

The gross sales price of the gas rights which petitioner sold to Pacific Oil Company in January of 1947 was \$609,514.46. Of this amount \$230,000 was allocable to the Henning Tract gas rights, and \$379,514.46 was allocable to the McDonald Tract gas rights.

In its income tax return for 1947, the petitioner claimed that its basis for gain or loss on the Henning Tract gas rights was \$230,000, that the amount received therefor was \$230,000, and reported no profit on their sale. The respondent disallowed all of the claimed basis of \$230,000 and determined a deficiency of \$66,082.54 in petitioner's income tax for 1947.

Opinion

Raum, Judge: McDonald Island consisted of two tracts of land, Henning Tract and McDonald Tract, both used for farming. In addition, gas had been discovered under the island in 1935, and

thereafter the gas rights were leased to Standard Oil Company of California. Petitioner had owned the Henning Tract for a long period of years. The mineral rights under that land had a zero basis to petitioner. On June 27, 1946, petitioner transferred the Henning Tract, including the mineral rights, to its wholly owned subsidiary at its original cost, which was substantially less than its then fair market value as well as less than its book value. In December, 1946, when a sale of the gas rights under the entire island to Standard Oil had already been arranged, the mineral rights, including gas rights, under the Henning Tract, were declared as a dividend by the subsidiary and reconveyed to the petitioner. The value of the gas rights at that time was \$230,000. Shortly thereafter the sale was consummated, and the portion of the sale price allocable to the gas rights under the Henning Tract was \$230,000. Although these gas rights had a zero basis in the hands of petitioner for a number of years, its contention is that by reason of the conveyance to the subsidiary and reconveyance some six months later as a dividend, these rights acquired a stepped-up basis equal to \$230,000, with the result that it realized no gain upon the sale.

The Commissioner argues that the transfer of the mineral rights to the subsidiary was not bona fide, that no business purpose was served or intended by such transfer, that the possible sale to Standard Oil was contemplated from the beginning, and that the round-trip of these rights from parent to subsidiary and back to parent again was engineered for

the purpose of attempting to obtain a stepped-up basis.¹

The question is largely one of fact, for, if it be true that the round-trip of the mineral rights was in fact a sham and lacking in bona fides, petitioner's basis for the rights, namely zero, will be unaffected, and its gain on sale must be measured from that basis.

In cases of this character the absence of any direct evidence of sham is not surprising. If petitioner intended from the beginning, through those who controlled its affairs, to transfer the entire Henning Tract to the subsidiary with the expectation of a re-transfer of the mineral rights, it is hardly likely that such intention would be admitted. The intention, if it did exist, would ordinarily have to be established by circumstantial evidence. And in this connection it is important at the outset to bear in mind the matter of burden of proof. Petitioner's counsel completely misconceives the burden of proof when he says in his reply brief "In order successfully to attack the conveyance of Henning Tract as

¹Of course, on petitioner's theory, the re-transfer of the rights to it by the subsidiary would result in petitioner receiving a taxable dividend in the amount of \$230,000. However, by reason of Section 26(b), I.R.C. of 1939, 85 per cent of that dividend is received tax-free. In substance, therefore, the tax advantage to petitioner would be that it would be chargeable with dividend income in the amount of only 15 per cent of \$230,000, while the entire gain of \$230,000 upon sale of the gas rights to Standard Oil would be tax-free.

to mineral rights, the Commissioner must show that they were included with the intent to pull them back again into the petitioner for purposes of ultimate disposition." The burden is not upon the Commissioner. The burden is upon the petitioner to overcome the correctness of the Commissioner's determination. Moreover, the requisite business purpose or intention must be established by evidence; it is not enough for counsel to theorize as to what the intention might have been. It must be shown by satisfying evidence that the alleged business purpose was in fact entertained as a motivating factor by petitioner or its responsible representatives; a possible business purpose conceived after the event in order to give color to the transaction cannot retroactively supply the required bona fides which might otherwise be lacking. We have concluded, after hearing the witnesses and studying the entire record, that the alleged business purposes relied upon by petitioner to explain the manner in which the transaction was carried out were colorable only, and that the round-trip of the mineral rights was contemplated from the start and was lacking in bona fides.

Prior to the issuance of the deficiency notice in this case, petitioner filed a written protest against the proposed deficiency. The protest stated two reasons for the transfer of the mineral rights to petitioner's subsidiary, as follows:

* * * The transfer was made so that all the McDonald Island property would be owned by one company and thereby lend itself to a more efficient

conduct of farming operations. Also, all the land could then be pledged as collateral to a trust deed note with a bank. * * *

Each of these reasons is spurious. While it may be true that the farming operations on McDonald Island could be more efficiently conducted if all the surface rights were in a single ownership, the ownership of the mineral rights is completely immaterial in this connection. Indeed, when petitioner on June 27, 1946, transferred to its subsidiary the Henning Tract and its interest in the surface rights in the McDonald Tract, it at the same time retained and did not transfer to the subsidiary the mineral rights in the McDonald Tract. Moreover, the December 21, 1946, resolution of the board of directors of the subsidiary, providing for the re-transfer of the mineral rights to petitioner explicitly recited that "none of the rights * * * are necessary for the operation of the business of this corporation and may be distributed to the stockholder thereof by way of a dividend in kind." It is quite plain that they were no more necessary to the business of the subsidiary on June 27, 1946, when they were first transferred by petitioner as part of the entire Henning Tract.

The second reason suggested by the protest, i.e., that the land could be pledged as collateral to secure a bank loan, is equally spurious. The evidence shows that the loan in question had already been negotiated, and that it was to be secured by a deed of trust with respect to the entire island, excluding,

however, all mineral rights. It was therefore misleading to suggest that the proposed bank loan was a motivating factor in the transfer of the mineral rights to the subsidiary.

In the testimony before us, the reasons set forth in the protest were repeated and embellished. However, we are firmly convinced on this record that these reasons did not in fact play any part whatever in the transfer of the mineral rights. And other reasons advanced, some of them merely variations of the foregoing, appear to us to be afterthoughts. We are satisfied that the transfer of the mineral rights had in fact no business purpose whatever, other than to set the stage for an attempt to establish a stepped-up basis for these rights.

It should be remembered that petitioner was encountering difficulty with Standard Oil in connection with Standard's leases of these gas rights. One way of settling the dispute was to have Standard purchase the rights. Standard had made an offer of \$500,000 for the gas rights under the entire island in November 1945. The offer was considered too low and was not accepted. The conflict between Standard and the petitioner persisted. The transfer of the Henning Tract to the subsidiary took place on June 27, 1946, and shortly thereafter, in July 1946, petitioner's president offered to sell the gas rights under the entire island to Standard for some \$800,000. Here then was a situation where petitioner knew that a sale to Standard was a distinct possibility, provided that a satisfactory price

could be agreed upon, and where its president² reactivated the negotiations with Standard after transferring the rights to the subsidiary. To be sure, the evidence is circumstantial, but it is strong and convincing that when petitioner transferred the Henning Tract to the subsidiary it intended to recapture the mineral rights. True, it was not able to come to terms with Standard in July or August of 1946, but negotiations were opened again in December of the same year, and an agreement was finally reached at that time.

It is no answer to say, as does petitioner's counsel, that petitioner merely employed a standard form of deed on June 27, 1946, when it transferred Henning Tract in its entirety to the subsidiary. Petitioner at that time was fully aware of a separate interest in the mineral rights, for, on the same day, its deed of its interest in the McDonald Tract to

²The protest falsely stated that after the transfer, "the petitioner was approached by a third party desiring to purchase all the known mineral rights located on the McDonald Island," identifying the third party as Pacific Oil Company. The fact is, as plainly shown by the evidence, that it was petitioner's president who approached Standard. The initiative at this time did not come from Standard or its subsidiary, Pacific Oil Company. This is a difference of great importance in the context of this case, for it shows that petitioner sought to bring about a sale of the mineral rights shortly after transferring them to the subsidiary. The affirmative step thus taken by petitioner within so short a period is highly persuasive that the transfer was made with a view towards attempting to bring about a sale thereafter.

the same subsidiary expressly excluded the mineral rights. And later, on the same day, the deed of trust to secure the bank loan expressly excluded the mineral rights under the very tract here involved. We are satisfied on the evidence that the course of action taken by petitioner was deliberate and calculated, without business purpose other than to establish an artificially stepped-up basis. The gas rights in the Henning Tract had a zero basis in petitioner's hands, and we hold that the planned excursion of these rights from petitioner to its subsidiary and back again to petitioner could not result in any stepped-up basis. The intermediate steps were lacking in bona fides, and must be ignored.

Decision will be entered for the respondent.

The Tax Court of the United States
Washington

Docket No. 43504

WEYL-ZUCKERMAN & COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed February 14, 1955, it is ordered and decided: That

there is a deficiency in income tax of \$66,082.54 for the year 1947.

Entered: Feb. 15, 1955.

[Seal] /s/ ARNOLD RAUM,
 Judge

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

1. Weyl-Zuckerman & Company, a corporation, represents that on February 15, 1955, the Tax Court of the United States rendered a decision that there is a deficiency in income tax of petitioner in the sum of \$66,082.54 for the year 1947.

2. Petitioner represents that it is a California corporation and that its return for Federal tax purposes for the taxable year 1947 was made to the Collector of Internal Revenue for the First District of California, which is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

3. The nature of the controversy is as follows: What was the cost base to petitioner of the mineral rights underlying a tract of farming land—known as Henning Tract—which were sold in January 1947 by petitioner to Pacific Oil Company.

The determination of the foregoing issue depends in turn on the question whether the conveyance by petitioner in June 1946 to its subsidiary of the entire fee of the property, including surface and mineral rights, was for a business purpose.

When—approximately seven months later—an opportunity for sale of the mineral rights arose, the subsidiary declared a dividend in kind of the rights. Accordingly, they were conveyed by the subsidiary to the petitioner and the sale was consummated.

The Tax Court has decided that the conveyance in June 1946 by petitioner to its subsidiary was a subterfuge; that at the time of the conveyance the petitioner intended to have the mineral rights returned to it as a dividend, and that petitioner's purpose from the beginning was to set up the cost basis of the rights and by that means reduce the capital gain on the subsequent sale to Pacific Oil Company.

Petitioner contends that there is no evidence to support the conclusion of the Tax Court; that there are no findings of fact that justify the decision; that there is no evidence that at the time of the conveyance of the Henning Tract to the subsidiary a sale to Pacific Oil Company, or any other person, was in contemplation or deemed likely; that there is no evidence that the prospect of a sale played any part in the reasons which actuated the conveyance to the subsidiary; that such conveyance was made for adequate and genuine business reasons; that the idea of a dividend of the mineral rights by the subsidiary to petitioner first arose when an opportunity

to sell the rights presented itself in December 1946; and that the expedient of a dividend was adopted in order to avoid the payment of a substantial sum on account of an existing indebtedness if the conveyance to the Pacific Oil Company had been made directly by the subsidiary.

4. As the basis for review, petitioner submits the following assignments of error:

(a) The Tax Court erred in holding that the sale of Henning Tract by petitioner to its subsidiary was sham and not bona fide.

(b) The Tax Court erred in holding that the conveyance to the subsidiary of Henning Tract in its entirety, and the dividend of mineral rights from the subsidiary which occurred seven months later, was contemplated from the beginning as a means of reducing the capital gain on the prospective sale of the rights to Pacific Oil Company.

(c) The Tax Court erred in holding that there was no evidence of a business purpose in the transfer of Henning Tract by petitioner to its subsidiary.

(d) The Tax Court erred in holding that there was merely a possible business purpose in the conveyance conceived after the event in order to give color to the transaction.

(e) The Tax Court erred in holding that there is circumstantial evidence that when petitioner transferred the Henning Tract to the subsidiary it intended to recapture the mineral rights.

(f) The Tax Court erred in holding that the course of action taken by petitioner was deliberate and calculated, without business purpose, other than to establish an artificially stepped-up basis.

(g) The Tax Court erred in ordering and decreeing that there is a deficiency in income tax against petitioner of \$66,082.54 for the year 1947.

Wherefore, your petitioner prays that the Court of Appeals review said decision of the Tax Court pursuant to applicable statutes and rules of said Court of Appeals.

Dated: May 9, 1955.

/s/ DAVID LIVINGSTON,
Attorney for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Filed May 11, 1955.

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To the Chief Counsel, Internal Revenue Service,
Washington, D. C., Attorney for Respondent:

You Are Hereby Notified that on May 11, 1955, petitioner filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of said Tax Court

rendered on February 15, 1955, in the above entitled case. Attached hereto is a copy of said Petition for Review.

Dated: May 11, 1955.

/s/ DAVID LIVINGSTON,
Attorney for Petitioner

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed May 13, 1955.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the following documents, 1 to 13, inclusive, constitute and are all of the original papers and proceedings, including joint exhibits 1-A and 2-B attached to the Stipulation of Facts, Petitioner's exhibits 3 through 10 admitted in evidence, Respondent's exhibits C through G and J admitted in evidence, (H, I and K-M.F.I. and not left with the record) on file in my office as called for by the "Designation of Contents of Record on Review" and "Designation for Additional Portions of Record on Review" in the proceeding before The Tax Court of the United States entitled: "Weyl-Zuckerman & Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 43504", and in which the petitioner in The Tax Court proceeding has initiated an appeal

as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 25th day of May, 1955.

[Seal] /s/ VICTOR S. MERSCH,
Clerk, The Tax Court of the
United States

The Tax Court of the United States

Docket No. 43504

WEYL-ZUCKERMAN & COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Room 421, Appraisers Building, 630 Sansome St.,
San Francisco, Calif., Thursday, March 18, 1954—
10:15 a.m.

(Met, pursuant to adjournment.)

Before Honorable Arnold Raum, Judge.

Appearances: David Livingston and Louis F. Di
Resta, Russ Bldg., San Francisco, Calif., appear-

ing for Petitioner. Charles W. Nyquist (Honorable Daniel A. Taylor, Chief Counsel, Bureau of Internal Revenue, appearing on behalf of Respondent. [1*]

* * * * *

[Clerk's Memo: Official report of proceedings before the Tax Court on March 17 and 18, 1954, consisting of 203 pages, beginning with the testimony of John Zuckerman at page 22, and excluding the opening statements which precede the testimony.]

Whereupon,

JOHN ZUCKERMAN

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Have a seat, sir, and state your name and address, please.

The Witness: My name is John Zuckerman, address is 2308 Virginia Lane, Stockton, California.

Q. (By Mr. Livingston): Were you a director of Weyl-Zuckerman and Company in the years 1946 to—in the years 1941 to 1946?

A. No, sir.

Q. What connection did you have with Weyl-Zuckerman during that period?

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of John Zuckerman.)

A. I was farming superintendent and manager.

Q. And did you have any official capacity with the [22] McDonald Island Farms, Ltd.?

A. Yes, sir, I was director and president.

Q. Are you familiar with the transaction which occurred on March 13, 1946, involving the purchase by Weyl-Zuckerman and Company, a corporation, from Holly Sugar Company, a corporation, of one-half of the outstanding capital stock of McDonald Island Farms, Ltd.?

A. Yes.

Q. Do you know the price of that stock was \$216,620, was it not?

A. Yes.

Q. Do you know the source from which the money was obtained in order to pay that purchase price?

A. Yes, it was borrowed from the Bank of America.

Q. Was there any negotiation at that time for the—for obtaining a larger loan from the Bank of America or did those negotiations—

A. What was the date, Mr. Livingston?

Q. March 13, 1946.

A. No.

Q. When did the negotiations initiate?

A. Sometime after that.

Q. Can you tell me anything more definite as to the point of the time?

A. Almost immediately after the Holly stock was acquired, [23] then I began negotiating with the Bank of America and also with the Prudential Life Insurance Company.

Q. Well, let's eliminate the first, the Prudential

(Testimony of John Zuckerman.)

Life Insurance Company. What happened in respect to those negotiations, were they terminated without result or what? A. Yes.

Q. All right. Now as to the Bank of America, were those negotiations successful?

A. Yes, we borrowed \$72,000.

Q. And in order to borrow that \$72,000 what was necessary to provide security?

A. Well, we had to give——

Mr. Nyquist: Objection, your Honor, to what is necessary; calling for a conclusion of a witness. He may not know what was necessary.

Mr. Livingston: Well, may I put it this way, then:

Q. (By Mr. Livingston): What did the Bank of America require as security?

A. They required a deed of trust on the entire 6100 acres contained in McDonald Island.

Q. Pardon me just a moment. Let me interrupt. When you say 6100 acres, that refers to both sides of McDonald Island?

A. Yes, sir, the entire.

Q. One side being called McDonald Tract? [24]

A. That had 3400 acres.

Q. And the other side is called Henning Tract?

A. Yes, sir, that has 2700 acres.

Q. Now, you got as far as telling us they required a deed of trust on that property.

A. They required a deed of trust on the property. They required notes, naturally, and they required that we discharge certain obligations, certain

(Testimony of John Zuckerman.)

liens against the various parts of the island. They wanted one ownership and they wanted an agreement that should we make, in any one year——

Mr. Nyquist: Objection, your Honor. If we are going to testify about the term of an agreement I should think the agreement itself is the best evidence.

Mr. Livingston: I agree with counsel. We have a photostatic copy of the agreement itself. We will get that later on.

Q. (By Mr. Livingston): Anyhow, they wanted some agreement with respect to cash payments, is that it? A. Yes, sir.

Mr. Livingston: I am showing counsel now a deed of trust dated May 20th, 1946, McDonald Island Farms, Ltd.

Mr. Nyquist: Do you want me to take time to read it? [25]

Mr. Livingston: Oh, no, I wouldn't suggest that you do that, just at your convenience. After counsel has had an opportunity to examine that I will make my offer.

Q. (By Mr. Livingston): Now, can you tell me in whose name this property was placed at that time?

A. McDonald Island Farms, Ltd.

Q. And——

The Court: By "this property" you mean what?

Mr. Livingston: The——

The Court: What does the witness mean?

(Testimony of John Zuckerman.)

Q. (By Mr. Livingston): Yes, what do you mean by the "property"?

A. The entire island, McDonald Island, the 6100 acres of land.

The Court: That is both surface and subsurface rights?

The Witness: No, your Honor.

Mr. Livingston: No.

The Court: You shouldn't use such loose terms as "this property"; I don't know what you mean by that.

Mr. Livingston: I intend to define it more accurately.

Q. (By Mr. Livingston): In whose name were the surface rights placed in [26] respect to McDonald Island or the McDonald Tract?

A. May I ask at what time?

Q. For the purpose of this transaction.

A. McDonald Island Farms, Ltd.?

Q. Yes, and from whom were the surface rights acquired, if any surface rights were so acquired at that time?

A. They were acquired from Weyl-Zuckerman and Company.

Q. What portion of the surface rights were owned by Weyl-Zuckerman and Company at that time?

A. 2700 acres, which was the Henning Tract.

Q. No, no. I mean, we are talking now, I think I have confused you—we are talking now about the surface rights of McDonald Tract. I think you have

(Testimony of John Zuckerman.)

testimony thus far that the surface rights of McDonald Tract were embodied in a deed of trust to the Bank of America together with other property.

A. That is right.

Q. Now, confining yourself to the surface rights on McDonald Tract, I am asking you what portion of those rights at that time and prior to this transaction of June 27th, 1946, were owned by Weyl-Zuckerman and Company?

A. One-third was owned by Weyl-Zuckerman and Company.

Q. Now, what if any, interest in the surface rights did Zuckerman Potato Company, the partnership, have in those? A. One-third.

Q. And the other one-third still remained in the name [27] of McDonald Island Farms, Ltd.?

A. Yes, sir.

Q. That accounts for the three thirds, or the entire surface rights on McDonald Tract, is that correct? A. Correct.

Q. And I believe you testified—strike that, please.

Did Weyl-Zuckerman and Company, prior to this deed of trust, transfer its one-third of the surface rights to McDonald Farms, Ltd.?

A. Yes, sir.

Q. Did Zuckerman Potato Company, a partnership, make a similar transfer? A. Yes, sir.

Q. All right. Now, with reference to the other side of the island, that was called Henning Tract, is—— A. Yes.

(Testimony of John Zuckerman.)

Q. —that correct? A. Yes, sir.

Q. And prior to this transaction with the Bank of America, who was the owner of Henning Tract?

A. Weyl-Zuckerman and Company.

Q. And in order—did Weyl-Zuckerman and Company deed the property known as Henning Tract to McDonald Island Farms, Ltd., so that McDonald Island Farms, Ltd., could, in turn, hypothecate that property to the Bank of America?

A. Yes, sir.

Q. Now, the transaction involving the transfer of Henning Tract by Weyl-Zuckerman and Company to McDonald Island Farms, Ltd., was there any differentiation to surface rights and to mineral rights? A. No, sir.

Mr. Nyquist: May I have that question again? I didn't quite get it.

(The last question was read by the reporter.)

Mr. Nyquist: Your Honor, I object to that question as being vague and indefinite and unintelligible and I ask that the question and answer be stricken.

Mr. Livingston: I will be glad to improve on it, if it is necessary.

Mr. Nyquist: I don't know what it means.

Mr. Livingston: Well, the question means: did they transfer the property in its entirety—

The Court: Suppose you rephrase the question.

Q. (By Mr. Livingston): When the transfer of Henning Tract was made to McDonald Farms, Ltd., from Weyl-Zuckerman and Company, was the prop-

(Testimony of John Zuckerman.)

erty transferred in its entirety or were mineral rights divorced from the surface rights?

A. It was transferred in its entirety.

Q. Now, can you state whether or not there were business [29] reasons for consolidating the two portions of the island into one portion?

Mr. Nyquist: Objection, your Honor. That calls for a conclusion of the witness and it is what this court is called upon to decide. If he has any reasons he wants to state that may be another matter, but as to what constitutes business reasons I think is the ultimate conclusion.

Mr. Livingston: I will ask him then:

Q. (By Mr. Livingston): Assuming that objection to be sound, will you state what, if any, business reasons there were for that transaction?

Mr. Nyquist: I would like to further ask that question be clarified as to whose reasons is he talking about, this witness's reasons, one corporation's reasons, another corporation's reasons, or whose reasons are we talking about here?

Mr. Livingston: Well, I assume it is the reasons that actuated the witness and his associates in connection with these transactions.

The Court: You may ask him why it was done in the manner in which the transaction was handled.

Mr. Livingston: I will adopt that question, if I may, your Honor.

Q. (By Mr. Livingston): Why was this transaction, involving the transfer of [30] the property that you have described to McDonald Island Farms,

(Testimony of John Zuckerman.)

Ltd. handled in the manner in which it was handled?

A. Well, the reason that the property was all put in the name of McDonald Island Farms, there were two general classes of reasons, one was farming reasons, the other was financial reasons, that is, relating to the financing of the purchase. The farming reasons were that here were two large pieces of land being farmed side by side, they were both suitable for similar crops and it was far more economical to operate them as one unit than as two separate units. The reasons for this are, under mechanized farming, you have to own a lot of mechanized equipment, men operating two sets of equipment, operating two separate machine shops which are very expensive with probably ten or fifteen mechanics in each, meant keeping two complete sets of books, two sets of employees, it meant that any time one piece of equipment or more, or employees from one side of this island crossed Wiskey Slough, which is the dividing line and worked on the other side, it all had to be accounted for, charge made to the other corporation, and in general, the bookkeeping process, the whole accounting process, the whole farming process, was far more costly under two ownerships than under one ownership.

The Court: Was that the fact prior to the transfer of all the property to McDonald, Ltd.?

The Witness: Yes, sir. [31]

The Court: You are not describing the hypo-

(Testimony of John Zuckerman.)

thetical situation, you are describing the facts as they existed?

The Witness: That is correct.

Mr. Livingston: Maybe I would like to clarify the record, your Honor. Maybe we are thinking the same thing, your Honor. As I understand it, the witness is describing the conditions that prevailed when two different owners are operating each of the two different sides of the island and the handicaps that are involved in that respect which could be overcome by single ownership; is that the impression that your Honor has?

The Court: The record will speak for itself.

Mr. Livingston: All right, then, let me clarify it.

The Court: You are not entitled to clarify anything yourself. You can adduce clarification from the witness.

Mr. Livingston: My expression was ill-advised. Let me make an effort to have the witness clarify it.

Q. (By Mr. Livingston): The conditions that you have described, were they the conditions that prevailed at the time when the ownership of the McDonald side, as opposed to the Henning side, were in different persons?

The Court: Well, he told me he was describing an actual situation and not a hypothetical one.

Q. (By Mr. Livingston): All right, now, what about the matter of planting crops?

A. That was what I was coming to. Our main crops, our principal crops, and the crops that return us the best revenue are potatoes. We like to

(Testimony of John Zuckerman.)

plant potatoes on the ground best suited for potatoes. We like to plant soil building crops on ground we like to rest. If we preserve these as two separate entities we would have to have some proportion of potatoes on each side of the island, some proportion of soil building crops on each side of the island, whereas if we had them on one ownership, one operation, if the land on one side of the island were best suited to potatoes we could use that without regard to having to have some on each side. This was always also true of other crops. Now, you want——

Q. Now, I think, will you go to the financial—you mentioned the financial aspect, the advantage of single ownership?

A. Yes. In order to properly secure a loan in the amount of \$720,000, which we needed to consummate these various purchases——

The Court: What was it that you were purchasing?

The Witness: Well, we were purchasing the 2700 acres of the Henning Tract side from Weyl-Zuckerman and Company in the amount of three hundred and thirty—roughly 330,000. We were purchasing one-third of the surface rights. [33]

The Court: By “we” you are speaking of McDonald, Ltd.?

The Witness: Yes, sir, of which—yes.

The Court: Go on.

The Witness: All right. We were purchasing one-third of the McDonald Tract from the Zuckerman

(Testimony of John Zuckerman.)

Potato Company, we were purchasing one-third of the McDonald Tract from Weyl-Zuckerman and Company. May I go ahead? We were also obligated to pay off various liens and obligations against the land and in order to repay the bank the \$216,000 which had been borrowed from them to buy the McDonald stock from Holly Sugar Company that money also had to be raised and the aggregate amount that was necessary to carry through this entire action was very close to \$720,000.

Q. (By Mr. Livingston): Well, in answer to the Court's question I don't believe you mentioned the money that was necessary in order to buy the mineral rights under McDonald Tract from Holly Sugar Corporation.

A. That is correct. That is an additional \$120,000.

The Court: Well, there has been testimony about a Zuckerman Potato Company. I haven't the remotest idea of what the Zuckerman Potato Company is, who they were, how they acquired any interest in the pertinent properties.

You have got this record in a confused state. [34]

Mr. Livingston: All I can say, your Honor, is I can't prove it all at once. I realize that thus far the record does not disclose——

The Court: Well, if you intend to bring all these matters out in due course——

Mr. Livingston: I hope so. If I miss some of them your Honor will certainly bring it to my attention.

(Testimony of John Zuckerman.)

The Court: Proceed.

Mr. Livingston: As long as we are on that subject now, let's go to it.

Q. (By Mr. Livingston): Who was the Zuckerman Potato Company?

A. Zuckerman Potato Company was a partnership made up of some of the principals and some of the employees of Weyl-Zuckerman and Company, and my best recollection is that it was formed in 1940—beg your pardon, '42. It was formed for the purpose of farming leased lands in Stockton, in Oregon, and in Kern County, for the purpose of responding to the Government's request that we produce this food production for the war effort.

Q. And then will you state why a separate partnership was formed for the purpose of expanding the farming activity rather than have Weyl-Zuckerman and Company, which was the existing corporation, do it?

A. There were two main reasons. One is we wanted to [35] bring some of our employees into a position where they were participating in the profits of our farming operations which was very difficult to do under our corporate structure. The other and the more—the main reason, was that these farming activities embraced about three or four thousand acres which required a capital outlay of at least a million dollars, sometimes more, and a very hazardous and a—and a hazardous type of venture where one frost or one market upset could wipe the whole thing out. Under the tax structure

(Testimony of John Zuckerman.)

that Weyl-Zuckerman and Company had everything they made over a very small amount would be subject to excess profits tax and we stood no chance of profiting, and we stood a tremendous chance of losing everything that we had, and being completely wiped out. Therefore, when we decided to expand or, in response to the request, to expand, we did it in the form of this partnership rather than as Weyl-Zuckerman and Company.

The Court: Well, how did part of this island get into the hands of the partnership?

The Witness: All right, sir——

Mr. Nyquist: That will be covered in the stipulation, your Honor.

The Court: Thank you very much.

Mr. Livingston: I would like, however, to explain it, if your Honor please. The Court has inquired on the subject of how that happened. Now, the stipulation will provide us [36] with the date upon which that occurred, but I think the stipulation will also disclose that Weyl-Zuckerman and Company, a corporation, was given an option by the Holly Sugar Corporation to purchase from Holly Sugar Corporation its one-third underwritten fractional interest in the surface rights of McDonald Tract.

The Court: You understand that everything that you are saying is not evidence at all?

Mr. Livingston: I realize that.

The Court: I couldn't possibly make any finding of fact on the basis of anything you are saying. If these matters are in the stipulation of fact, I

(Testimony of John Zuckerman.)

can, of course, make a finding on it to the extent that you get testimony from this witness, I can make finding, but any statements that you make can not possibly be of any help other than merely to expand your opening statement of what you expect to prove.

Mr. Livingston: Well, I probably omitted something. Will you read the beginning of my statement, please? I thought I referred it to the stipulation of facts. If I didn't, I would like to amend it.

(Statement of counsel read by reporter.)

Q. (By Mr. Livingston): All right, now, the fact was, was it not, Mr. Zuckerman, that the option from the Holly Sugar Corporation to purchase the one-third interest in the surface rights of [37] McDonald Island Tract was conferred on Weyl-Zuckerman and Company? A. Yes, sir.

Q. Will you explain, please, why it was that the option, when exercised, was not exercised by Weyl-Zuckerman and Company but was exercised by this Zuckerman Potato partnership?

A. Yes. I—Zuckerman Potato Company, at that time, had the money to buy it with, to exercise the option, to pay Holly, and at that time Weyl-Zuckerman was hard up and didn't have the money. Therefore, that exercise was transferred to the Zuckerman Potato Company.

Q. You mean that option was transferred?

A. Option, I beg your pardon.

Q. To the partnership, and the partnership exercised—— A. Yes.

(Testimony of John Zuckerman.)

Mr. Livingston: And, I think we have explained, if your Honor please, how the Zuckerman Potato Company acquired that one-third interest.

Q. (By Mr. Livingston): All right. Will you kindly proceed and explain—proceed with your explanation of the reasons which existed at that time for consolidating the ownership of the surface rights on McDonald and the ownership of Henning Tract into McDonald Island Farms, Ltd.? I think you had covered all of [38] the farming aspects of it in your testimony and I would like to ask you what, if any, connection the McDonald history, financial history, had with the desirability of selecting McDonald as the owner?

Mr. Nyquist: Your Honor, I would like to ask that this be clarified at this time. This witness is obviously going to be asked a lot of questions about reasons. He was an officer of McDonald Island Farms, he was not an officer of Weyl-Zuckerman and Company, Petitioner. Now, are we talking about his personal reasons, or whose reasons are we talking about? I think the question should be clarified in this respect. In certain respects it might be subject to objection and in this vague form it is hard to tell how objectionable the questions are.

Mr. Livingston: I think the purpose of the question is to elicit facts from the witness. He has stated nothing but facts up to this moment in his explanation, and if necessary, I can ask whether any facts in the history of McDonald Island Farms, Ltd., which were related to or had connection with this

(Testimony of John Zuckerman.)

transaction and the vesting of title of the property heretofore described in McDonald Island Farms, Ltd.

Mr. Nyquist: Your Honor, a corporation, and we are dealing with corporations here, is an inanimate object which has no mind or reasons. Reasons are in people's minds. When [39] we are talking about reasons here, I would like to know whose reasons. The witness is testifying to his personal reasons or the reasons in somebody else's mind?

Mr. Livingston: He is about to testify to the facts. That is what I understand. That is the purpose of the question, what facts were there, and I will ask, Mr. Zuckerman, in giving your testimony to confine yourself to facts of which you have personal knowledge, your connection with these companies. The witness has testified that he was a director and president of McDonald Island Farms, Ltd., that he was the manager of Weyl-Zuckerman and Company, so I think he is qualified from his connection with those two companies to—at least he is able to provide the court with some indication that the facts concerning which he testifies are those which he knows, and facts, after all, are the things which——

The Court: That is not the basis for the Government's objection to your question. The Government is objecting to your question on the ground it is so vague it doesn't know whether it can be objected to or not.

(Testimony of John Zuckerman.)

Mr. Nyquist: Will you refine your question and make it more specific?

Mr. Livingston: I will do so. I am afraid I will meet with another objection; however, we will cross that bridge when we meet it. [40]

Q. (By Mr. Livingston): What was the condition of McDonald Island Farms, Ltd., with respect to excess profits credit?

A. May I answer? McDonald Island Farms, Ltd. had built up an excess profits credit, or an excess profits base, of somewhat in excess of a hundred thousand dollars and—Well, that answers the question.

Mr. Nyquist: May that be clarified as to time, please?

Mr. Livingston: Go ahead; Mr. Nyquist would like you to clarify that as to time.

Mr. Nyquist: When? When are you speaking about?

The Witness: 1946.

The Court: What do you mean it had built up in 1946? Are you speaking about a carry over from prior years?

The Witness: I am talking about it had an excess profits base of somewhere in excess of a hundred thousand dollars.

The Court: And that base was more than the company needed to absorb its current income?

The Witness: No, sir, I just said they had the base.

(Testimony of John Zuckerman.)

The Court: All right. It is not a very meaningful statement to me yet.

The Witness: Well, may I say why it is relevant? We wanted to keep this McDonald Island Farms corporation in [41] existence for several reasons: it had an excess profits tax base which we didn't want to lose; it had a potato acreage allotment which we didn't want to lose; it had a wheat allotment base; it had a history in a great many fields that would have been lost had that corporation gone out of farming existence. The reason we transferred all that property to McDonald Island Farms, Ltd. rather than some other corporation was to preserve all those things that McDonald Island Farms, Ltd., owned by virtue of its existence.

Q. (By Mr. Livingston): But, Mr. Zuckerman, the Court doesn't apparently understand why these factors were of a value, unless I misunderstood.

A. They were profitable to the owners and to the stockholders of the corporation.

Q. Why were there any reasons for that? For example, take this allotment, acreage allotment, what was the value of that to a corporation insofar as its future operations were concerned?

A. Well, at the time there was the price support program in existence whereby the Federal Government was supporting the price of potatoes. In order to meet with that price support program you had to keep your acreage within an allotment given by the Government to you. In order to have an allot-

(Testimony of John Zuckerman.)

ment you had to have a history, and McDonald Island [42] Farms, Ltd. had a history.

Q. All right. Now, what about the credit standing of McDonald Island Farms, Ltd., what facts existed in that respect?

A. It had a very good reputation. During the time that there was a joint ownership of Holly Sugar Company and Weyl-Zuckerman and Company and McDonald Island Farms, Ltd., their bills were always paid promptly, their discounts were taken at the time when that corporation was jointly entered into in 1931 by the two companies there had been an outstanding bond issue of some 340,000, those bonds had all been called in and paid off—most of them, that is, had been called in and paid off at par plus and in financial circles, McDonald Island Farms, Ltd. had a very fine credit rating which was not true of Weyl-Zuckerman and Company. They had been in financial difficulties from time to time.

Q. Now, what about the condition with respect to the mineral rights on the two portions of the island? What were the facts in that regard and what part did they play in maintaining or preserving two independent owners of the separate portions of the island?

A. There were certain provisions in our—I say “our” meaning both McDonald Island Farms, Ltd. and Weyl-Zuckerman and Company—leases with the Standard Oil Company calling for offset practices and—— [43]

(Testimony of John Zuckerman.)

Q. You mean by that the drilling of offset wells?

A. The drilling of offset wells under certain circumstances which are common to almost all mineral leases and it was our feeling that we would weaken that position, our position to ask for offsets if there was only one corporation their holding one thing, and if we extended our position as regards the Standard Oil Company by having these leases in the hands of the certain corporations.

Q. What about the ownership of equipment at that time, which of the two corporations owned the bulk of the equipment?

A. McDonald Island Farms, Ltd.

Q. And——

The Court: You are speaking of farming equipment now?

Mr. Livingston: Yes, sir.

The Witness: Yes.

Mr. Livingston: Farming equipment.

The Witness: There was a——

Q. (By Mr. Livingston): At that time, will you state what farming—in what farming operations Weyl-Zuckerman and Company was engaged outside of the State of California?

A. Yes, we were farming—Weyl-Zuckerman and Company was farming in Klamath County in Oregon, they were also farming and had been farming since 1944 in Iron County, Utah, [44] and a large 4,000-acre ranch we were developing, we were spending a considerable amount of money in development of this.

(Testimony of John Zuckerman.)

The Court: When you say "we" were you an officer of Weyl-Zuckerman and Company at the time?

The Witness: It is rather difficult for me to differentiate at this time because I was managing both companies, that is why I say "we".

The Court: I see.

Q. (By Mr. Livingston): What was the nature of this venture in Utah, was it a proved venture or was it still experimental?

A. Well, it was a highly speculative venture. We went into the desert in the Escalante Valley, we cleared a lot of sage, cleared wells where no one had cleared before, and we were in a highly speculative venture there and spending a lot of money.

Q. What connection did that have in the desirability keeping from out of state activities divorced from the in state activities?

A. Well, two instances. One is we didn't want to confuse the bookkeeping between the two. We wanted to keep the farming separate. The other was that we didn't want our—the McDonald Island property in Stockton to be jeopardized by possible losses that might take place in Utah and Oregon.

Q. Now, during—let's go back a little if you don't mind.

During the period while Holly Sugar Corporation owned a one-half, one-half of the outstanding shares of McDonald Island Farms, Ltd., were the farming operations on McDonald Island side, the McDonald Tract side, carried on independently of

(Testimony of John Zuckerman.)

the farming operation on the Weyl-Zuckerman side? A. Yes.

The Court: Did Weyl-Zuckerman have separate farming equipment?

The Witness: Yes.

The Court: On the island?

The Witness: Yes, sir.

The Court: And McDonald, Ltd. had separate——

The Witness: Yes.

The Court: (Continuing) ——farming equipment?

The Witness: Yes.

Q. (By Mr. Livingston): Now, what was the relation—what were the relations between Weyl-Zuckerman and Company and Holly Sugar Corporation with respect to the operations on the McDonald Tract?

The Court: As of what time?

Q. (By Mr. Livingston): As of the period from the date of the acquisition [46] of the shares of stock by the two companies which—or their predecessors which, I believe, was in 1934, 1934 until the date upon which Weyl-Zuckerman and Company purchased the one half—one half of the shares from Holly Sugar Corporation in 19—on March 13th, 1946, which is the period of approximately twelve years?

A. Well, in a general way, they were very good up until some time in 1938 when McDonald Island Farms, Ltd. was in some financial difficulty and

(Testimony of John Zuckerman.)

was making its financial arrangements for the following year.

Mr. Rapetti, who was the manager of Holly Sugar Company and with whom Weyl-Zuckerman and Company had had all their dealing, was in Honolulu at the time and we had to deal with some other members of the company and we were given very cavalier treatment. They made it very difficult for us to secure financing, they threw a lot of difficulties in our way and that was not rectified until Mr. Rapetti returned and again took over the connections that we had with them.

I would say that from about 1939 up until 1941 or so they were good relations with Holly Sugar Company and continued that way up until the time that Mr. Rapetti resigned from the Holly Sugar Corporation. After that time our relations with the Holly Sugar Company were very strained. They wanted to plant sugar beets; we wanted to plant potatoes. They wanted to do many things which we did not want to do, and we had lots [47] of arguments and ultimately culminated in a complete stalemate where we were unable to elect a board of directors in, I believe, I think that year was—well, I can't remember whether it was '43 or '44.

Q. You mentioned in one year you were having a little difficulty in financing McDonald?

A. That is correct.

Q. And a little while ago you told us McDonald's history in credit standing was better than Zuckerman's.

A. That is correct.

(Testimony of John Zuckerman.)

Q. Can you explain the apparent conflict in those two statements?

A. Well, only that it took the cooperation of the two companies in this year 1938, when we had had closest—my recollection is again, this is eighteen years ago, that Weyl-Zuckerman and Company and Holly Sugar Company were called upon that year by the Citizens Bank with whom we were dealing, to guarantee the borrowings of McDonald Island Farms, Ltd., in order to get the money to plant their crops and that Weyl-Zuckerman and Company was willing to guarantee this loan and that the Holly Sugar Corporation was keeping a second deed of trust on the property in return for their guarantee on the note and also a bonus payment of \$10,000 and that we called difficulties.

Q. Is it a fact, then, that this was only a temporary [48] situation? A. Yes.

Q. As far as McDonald—— A. Yes, sir.

Q. ——Farms, Ltd. was concerned?

A. Yes, sir.

Q. Well, your last testimony raised another point that I think I would like to clarify. That is, you speak of borrowing the money for crops. Will you kindly explain whether in the farming industry that is a customary financial operation?

A. Well, yes, it is. Under large-scale farming where all of your money goes into the ground in springtime and stays there until the fall when the harvest begins, it is customary all over the West with large and small farming operations to borrow

(Testimony of John Zuckerman.)

the amount of money that you need during that period from a bank.

Q. In other words, it is——

A. Most companies do not have enough working capital to carry them through the year without any borrowing.

Mr. Livingston: That is what I had in mind.

Your Honor, I see it is after 12, and would this be a convenient time for a recess or shall we go ahead?

The Court: Do you wish the noon recess at this time?

Mr. Livingston: I would suggest that, because by [49] this time that stipulation should be ready and I think we should discuss—examine it, at least, before we leave the building.

Mr. Nyquist: I would think, your Honor, it might be another half hour before that might be ready. It is about a four-page typing job. I think if we could go on for another half-hour our stipulation would be in shape.

The Court: Off the record.

(Discussion off the record.)

The Court: I think I will call a noon recess until a quarter to 2.

(Whereupon, at 12:15 p.m., a recess was taken until 1:45 p.m. of the same day.) [50]

Mr. Nyquist: Your Honor, before the examination of the witness resumes, I would like, at this time, to offer a stipulation of facts together with the two returns that are attached as exhibits thereto.

(Testimony of John Zuckerman.)

The Court: The stipulation and exhibits will be received.

Whereupon, John Zuckerman resumed his testimony as follows:

Direct Examination—(Resumed)

Q. (By Mr. Livingston): Directing your attention, Mr. Zuckerman, to the dividend which was declared from McDonald Island Farms, Ltd., with respect to the surface rights, will you state whether Holly Sugar Corporation or Weyl-Zuckerman and Company demanded that declaration of dividend?

A. It was Holly Sugar Company.

Q. And will you state what steps were taken by Weyl-Zuckerman and Company to protect itself against the possible unfavorable consequences of the declaration of that dividend?

A. Well, as a condition to agreeing to the declaration of the dividend the Weyl-Zuckerman Company representatives on the McDonald Island Farms, Ltd. board of directors would not agree to the declaration of the dividend until the Holly Sugar Company had given to Weyl-Zuckerman and Company an option [51] to purchase the lien covered by that dividend.

Q. What was the situation with respect to the declaration of dividend or the proposed declaration of dividend of mineral rights under the McDonald Tract? Who was the one that urged that?

The Court: Now, there, just a moment. There

(Testimony of John Zuckerman.)

have been several dividends involved in this matter and I would like——

Mr. Livingston: You are right.

The Court: Just a moment. I would like the record to be perfectly clear as to just what the testimony is about. Now, when you spoke of Holly, of the demands of Holly, were you speaking of the dividend of August 11, 1943, the one that is dealt with in paragraph V of the stipulation?

Mr. Livingston: Of the surface rights.

The Witness: Yes, sir.

The Court: That is not the dividend that is before us in this litigation, though?

Mr. Livingston: No, your Honor.

The Court: That is a dividend that took place three years earlier?

The Witness: That is correct.

The Court: What has that got to do with this case?

Mr. Livingston: It has this to do with it, if your Honor please, I deem it is valuable for me to show that good [52] faith of these transactions from their very inception. In other words, I want to show that this is a genuine business transaction that was responsible for the condition that prevailed when we reached 1946. It may be somewhat——

The Court: Well, you go ahead.

Mr. Livingston: Yes. Let's see, withdraw that last question. Your Honor's criticism is sound.

The Court: Well, I was just inquiring, I am not criticizing.

(Testimony of John Zuckerman.)

Mr. Livingston: Well, the inquiry is correct because I had not identified it.

I am talking now of the dividend of mineral rights on the McDonald Tract that was made one-half to the Holly Sugar Corporation and one-half to Weyl-Zuckerman and Company, and for your Honor's information, that appears in paragraph VI of the stipulation, the transaction is under date of March 13th, 1946, and I will ask the same question about that dividend.

Q. (By Mr. Livingston): Who was it that insisted upon it?

A. It was the Holly Sugar representatives on the McDonald board of directors.

Mr. Livingston: Now, if your Honor please, I would like to introduce in evidence, but I think we can simplify the matter for the purpose of the record, the minutes of McDonald Island Farms, insofar as they disclose the development [53] of the transactions which eventually led to the declaration of the mineral right dividend. In other words, I don't want to have this evidence depend solely upon the testimony of a witness. The record itself demonstrates these facts upon which I rely, and I have shown these to Mr. Nyquist, and I think if we can simply read into the record certain portions of the minutes it will suffice.

Now, my suggestion is that we begin with the minutes of January 22nd, 1946, of the board of directors of McDonald Island Farms, Ltd., and I read the following:—

(Testimony of John Zuckerman.)

The Court: Well, wait a minute, before you do that, is there any objection on the part of the Government to including portions of the minutes in the record here?

Mr. Nyquist: Well, your Honor, here I object to the time that is being consumed by a lot of background material here that isn't really in controversy. The facts of the dividend and the subsequent option are stipulated and this witness has testified and this is cumulative on a point that really doesn't seem to be in dispute.

Mr. Livingston: I think counsel overlooks one aspect of it.

The Court: Well, apart from your position that it is cumulative, is there any other objection to it?

Mr. Nyquist: No objection to the minutes, your Honor. [54]

The Court: Then why don't you present the minutes in evidence rather than read them into the record?

Mr. Livingston: Then it isn't necessary that the record——

The Court: We can't, as a practical matter. If you mark the portions you want in, I think we can have the Reporter incorporate them in the transcript.

Mr. Livingston: That is what I was about to suggest. I didn't want to read the entire paragraph but merely to identify the particular paragraph on the page on which it appears.

Mr. Nyquist: Your Honor, I will stipulate that

(Testimony of John Zuckerman.)

if he turns the minute book over to the Reporter that there may be incorporated in the transcript the indicated paragraphs from the minutes of the particular meeting that we are referring to here.

The Court: Well, under those circumstances there may be inserted in the transcript, at this point, those portions of the minute book which counsel for Petitioner will identify and make available to the Reporter.

Mr. Nyquist: I request that he identify them by date, at the present time.

The Court: Will you so identify them?

Mr. Livingston: Minutes of the meeting of January 22nd, 1946, those paragraphs appearing on page 45 of the [55] record, paragraphs 2, 3, 4, and 5:

(Whereupon the following was copied into the record as though read.)

“The President thereupon called for a discussion of the second request made by Shareholder Holly Sugar Corporation at said annual meeting of the Shareholders, held on January 21, 1946, that there be declared a dividend in kind of the mineral rights and royalties owned by the corporation on McDonald Island in San Joaquin County, California. After discussion by the Directors, the following Resolution, proposed by Director M. Zuckerman, was unanimously adopted:

“‘Whereas Shareholder Holly Sugar Corporation, at the regular meeting of the shareholders held on January 21, 1946 at the office of this corporation, requested that this Board of Directors

(Testimony of John Zuckerman.)

declare a dividend in kind to the shareholders of the corporation of the mineral rights and royalties owned by the corporation on McDonald Island in San Joaquin County, California, and

“ ‘Whereas this Board of Directors has fully considered such request of said shareholder, and believes that a dividend in kind at this time of the mineral rights and royalties might not be for the best interests of the corporation and its shareholders, [56]

“ ‘Now, therefore, be it resolved, that no action be taken at this time with reference to said request of Shareholder Holly Sugar Corporation for a dividend in kind of the mineral rights and royalties owned by the corporation on McDonald Island in San Joaquin County, California, and that the same be retained by the corporation until such time in the future when this Board of Directors may deem it advantageous and for the best interests of the corporation and its shareholders that such dividend be declared’.”

Minutes of the meeting of March 8th, 1946, the portion of those minutes appearing on page 53, paragraph 5:

(Whereupon the following was copied into the record as though read.)

“The President then informed the Directors that Shareholder Holly Sugar Corporation, had again requested of the Directors that a dividend in kind to the shareholders, be declared out of the earned surplus of the corporation, consisting of the min-

(Testimony of John Zuckerman.)

erals, mineral rights, royalties and royalty rights owned by the corporation on the McDonald Tract, McDonald Island, San Joaquin County, California, and that if such a dividend in kind were to be declared by the Directors of this corporation, the same might be subject to the Corporate Securities Act of the State of California and require a Permit from the [57] Commissioner of Corporations of the State of California. Upon motion of E. L. Dana, seconded by W. H. Ziegler and unanimously carried, the following Resolution was adopted, To-wit:"

And finally, the minutes of March 13th, 1946, on page 69, the third paragraph, beginning with the words, "The President thereupon announced * * *" and the fourth paragraph:

(Whereupon the following was copied into the record as though read.)

"The President thereupon announced that shareholder, Holly Sugar Corporation, had renewed its request to this Board of Directors, originally made on January 21, 1946, that there be declared a dividend in kind of the minerals, mineral substances, mineral interests, ores, oil, gas, asphaltum and other hydrocarbons on McDonald Tract, McDonald Island, San Joaquin County, California, and royalties, royalty rights and proceeds therefrom, including rights, interests and estates, under and by virtue of a Lease and supplemental Agreements heretofore executed by this corporation with The Standard Oil Company of California, a corporation.

"The President then advised the Directors that

(Testimony of John Zuckerman.)

pursuant to the Resolution of this Board of Directors, duly passed at a special meeting of the 8th day of March, 1946, the President and Secretary had caused to be filed [58] with the Commissioner of Corporations of the State of California an Application for a Permit to declare such dividend in kind of said minerals, mineral rights and royalties, and that on the 11th day of March, 1946, a Permit approving such dividend in kind was issued by said Corporation Commissioner."

Mr. Livingston: That is all I will put in. I will put in some pages here so we can identify it easily. Now, I offer in evidence, if the Court please, the deed of trust——

Mr. Nyquist: Wait a minute.

Mr. Livingston: Pardon me. Did you want to say something?

Mr. Nyquist: I just wanted to check on that last page you identified here. I presume that relates solely to the dividend in kind, is that correct?

Mr. Livingston: Yes.

Mr. Nyquist: Very well.

Mr. Livingston: The deed of trust dated May 20, 1946, the McDonald Island Farms, Ltd. to Corporation of America, Trustee, and Bank of America National Trust and Savings Association as beneficiary. Counsel has seen this and has agreed that I may use it. And, in connection with that——

The Court: Just a moment.

Mr. Livingston: I beg your pardon? [59]

(Testimony of John Zuckerman.)

Mr. Nyquist: No objection to that, your Honor.

The Court: Be admitted.

The Clerk: No. 3.

Mr. Livingston: And in connection with that, a letter signed by McDonald Island Farms, Ltd., dated June 15th, 1946, addressed to the Bank of America showing the acceptance by the Vice President of the Bank of America. That likewise has been exhibited to counsel.

Mr. Nyquist: No objection, your Honor.

The Court: Be admitted.

The Clerk: Exhibit 4.

(The deed and letter were marked and received in evidence as Protestant's Exhibits Nos. 3 and 4.)

The Court: Now, what property is covered by Exhibit 3?

Mr. Livingston: Exhibit 3 covers——

The Court: In your view?

Mr. Livingston: Beg pardon?

The Court: In your view?

Mr. Livingston: It covers all of the surface rights of the McDonald Tract, all of the surface rights of Henning Tract. Your Honor will find——

The Court: Any subsurface rights?

Mr. Livingston: None at all, your Honor. Your Honor will find they are specifically excepted.

Q. (By Mr. Livingston): Now, referring to the subject matter of the Court's [60] last comment, inquiry, will you explain the facts with respect to

(Testimony of John Zuckerman.)

the exclusion of the mineral rights from the deed of trust?

Mr. Nyquist: Your Honor, I request that that question be clarified, "Will you explain the facts." If he is to state the facts——

Q. (By Mr. Livingston): All right, state the——

Mr. Nyquist: I don't know what he means by way of explanation of facts.

Mr. Livingston: Withdraw that question.

Q. (By Mr. Livingston): State what facts there were at the time of that transaction leading up to the exclusion of the mineral rights from the deed of trust?

A. Well, this deed of trust was given by McDonald Island Farms, Ltd., who did not own the mineral rights to the McDonald Tract. They specifically excluded the mineral rights which underlay the Henning Tract, even though they owned them, because that was the condition under which the loan arrangement with the Bank of America had been made.

Q. And what, if any, were the reasons for arranging that the mineral rights on the Henning Tract were not to be transferred in trust as security for this Bank of America loan?

Mr. Nyquist: I ask that we again specify whose [61] reasons?

Q. (By Mr. Livingston): The reasons of the corporation that is involved. That is, McDonald Island Farms.

A. They wanted the income.

(Testimony of John Zuckerman.)

Q. What do you mean by that, "they wanted the income?"

A. From the gas, oil there that was going to be produced. There was income coming from it and they wanted the income.

Q. Now, in the month of June, 1946, were there any conversations with the Standard Oil Company or any representative of the Standard Oil Company or the Pacific Oil Company or any representative of the Pacific Oil Company with respect to a sale of mineral rights?

A. There were none by us.

Q. And had there, at any time prior to that, been a—Strike that, please.

Was there a conversation in November, 1945, on that subject? A. Yes.

Q. Was there any conversation at any time after November, 1945 on that subject and prior to June 27th, 1946? A. No, sir.

Q. And will you state what was said in the conversation of November, 1945, in substance? [62]

A. Well, to the best of my recollection, Mr. Schroeder.

Q. Who is Mr. Schroeder?

A. Head of the Land and Lease Department of the Standard Oil Company, made an offer to either my father or me or both of us, I can't remember which, in which he said that they would be willing to purchase the entire rights, mineral rights, that is both under the Henning Tract lease and the McDonald lease in the amount of \$500,000.

(Testimony of John Zuckerman.)

Q. And what answer was given to that?

A. We told him that we did not own the mineral rights in their entirety, and if we did we wouldn't want to sell them.

Q. Now, was there a conversation on the subject of purchasing the mineral rights after June 27th, 1946?

A. Well, I don't know of any. I understand there was, but I wasn't a part of them.

Q. At all events, will you state what was the situation between the Standard Oil Company and McDonald Island Farms, Ltd. and Weyl-Zuckerman and Company in the months of June, July, and August, 1946?

A. Well, there was a condition of extreme enmity.

Q. Will you explain—give us the facts in that regard, please?

A. Yes. The percentage of the production from the entire McDonald gas field that was being paid was being paid [63] under what the Standard Oil Company calls a rateable tax plan.

I would like to explain, for the purpose of clarity, that in this gas field there were other people, property involved than McDonald Island Farms and Weyl-Zuckerman and Company. There were two leases, the Mayberri and the Ilden lease.

Q. Well, clarify that even further, if you don't mind. Explain what you mean by a gas field and the participation of these four different entities in the production of that field?

(Testimony of John Zuckerman.)

A. Well, I am no geologist, but the entire area there from which gas was being produced was called the McDonald Gas Field or the McDonald Field. Part of that, according to the Standard Oil, underlay the McDonald Tract, part of it underlay Henning Tract, part of it underlay Wiskey Slough, and part of it underlay the land of the property held under the Mayberri and the Ilden community lease and they were producing wells under each of these properties and the Standard Oil agreed to pay each person their fair and equitable share.

Q. You say they were producing wells on each of these four parcels?

A. Yes, sir.

Q. Were those producing wells drawing off gas that was held in common under all four pieces of property?

A. Yes. [64]

Q. Then the problem, as I understand it, was—correct me if I am wrong—to determine the correct allotment to be paid for the four different land owners for gas that was so produced?

A. That is correct.

Q. Go on.

A. That they did under what they called the rateable tax plan and at the inception of the production of the field, which was in '37 or '38, they assigned a certain percentage of this income to Weyl-Zuckerman and Company, a certain percentage to McDonald, and a certain percentage to Mayberri, and a certain percentage to Ilden.

After that time they steadily diminished the per-

(Testimony of John Zuckerman.)

centage paid to Weyl-Zuckerman and Company and increased the percentage, at various times, paid to either Mayberri and Ilden. Weyl-Zuckerman and Company objected strenuously to that throughout because it was under a very nebulous plan. It was based on two things. One, as I have stated, with relation to the area underlying the properties, the other with what they called a productivity or the producibility of the wells. That, I have no conception of what that means, but those were the factors that they said were involved.

Consequently, whereas they started off paying Weyl-Zuckerman and Company a twenty-four and some fraction—may I refer to some papers I have here, your Honor, that have [65] these particular figures?

The Court: You may refresh your recollection.

Mr. Nyquist: Your Honor, if it will help to expedite this, I will stipulate there was a dispute between petitioner and Standard Oil about the allocation of gas to be taken from these various stations.

Mr. Livingston: I accept the stipulation as to that.

Now, then, is counsel willing to stipulate as to another source of controversy between the Standard Oil Company and Weyl-Zuckerman and Company and also McDonald Island Farms which involved the obligation of the Standard Oil Company to drill offset wells? Are you in a position to stipulate on that?

(Testimony of John Zuckerman.)

Mr. Nyquist: Yes, there was a dispute there. I will so stipulate.

Mr. Livingston: And the fact is—Let's see if the stipulation encompasses——

The Court: Have you fixed the time of this so-called dispute?

Mr. Livingston: Will you help us in that respect?

The Witness: This was continuously, but more particularly in '46 when we were threatening to sue the Standard Oil Company.

Mr. Livingston: All right, and then let us [66] stipulate, if we may, that this controversy existed in the year 1946, controversy being that the Standard Oil Company had drilled on the Mayberri property, what was known as Mayberri Well No. 2.

Mr. Nyquist: I am not prepared to stipulate to all of these details. I am just stipulating that there was a dispute that gives you your background, doesn't it?

Mr. Livingston: It does, and I appreciate it.

Q. (By Mr. Livingston): Isn't it a fact that the Standard Oil Company had drilled a well on the Mayberri property which is known as Mayberri No. 2? A. Yes.

Q. All right. Now, what was the location of that well with respect to the property line?

A. It was so close to the property line that we felt that there was an offset well should be drilled, certainly on the McDonald Tract and possibly on the Henning Tract.

(Testimony of John Zuckerman.)

Q. And did you make those representations to the Standard Oil Company? A. Yes, sir.

Q. What did the Standard Oil Company do about it?

A. Well, they returned me a map, Mr. Schroeder again sent me a letter saying that this map represented the distances and he showed on the map that the Mayberri well was 800 feet [67] from the nearest boundary of the McDonald property and 1400 feet from the nearest boundary of the Henning property; also hired an independent engineer and had him make surveys and found these distances were much less, and at that time, which I think was August or September or October of 1946, we began to prepare a case to sue the Standard Oil Company to force them to live up to their contractual obligations.

Q. And specifically, to drive an offset well where? A. On the McDonald Tract.

Q. Yes.

The Court: And will you fix the time again, please, for that?

The Witness: Well, sir, it was in August or September or October of 1946 and I think it was in all of those months; by which I mean I was conferring with attorneys, I was having measurements made, I was doing a great number of things that required time during those three or four months, and some of the communication about the distances took place as early as, I believe, April of 1946.

Q. (By Mr. Livingston): Now, then, was there

(Testimony of John Zuckerman.)

an offer made or a conversation in the month of December, 1946, on the subject of the prospective lawsuit and of the possibility of a sale to avoid a lawsuit? A. Yes. [68]

Q. And who participated in that conversation?

A. George Schroeder and I.

Q. And can you recall where that conversation took place?

A. In Mr. Schroeder's office in the Standard Oil Building, in San Francisco.

Q. Now, can you give us the substance of the conversation insofar as it related to this prospective lawsuit and the possibility of sale?

A. The only substance that I can remember is that I told him that we would rather settle the matter amicably rather than go to the expense and the trouble and bother of a lawsuit.

Q. And what did he say?

A. He then suggested that they might talk purchase of the entire field. I said that that would be perfectly satisfactory, and then he said that they would not now offer \$500,000, that they had offered it the previous November because there had been royalties paid in the interim, and I said that 500,000 was way too low, anyway, and that it should be raised, and he said to how much, and I said, \$650,000, and he said that he would take the matter up with his superiors on that basis, \$650,000 for the entire field that underlay McDonald Island. That is both the McDonald Tract and the Henning Tract.

(Testimony of John Zuckerman.)

In other words, it would be a lump sum purchase so there were other things discussed, I don't remember all of them, but this was the substance of that discussion. [69]

The Court: In what capacity were you negotiating with Mr. Schroeder?

The Witness: Well, the representative of our stockholders.

The Court: By "our" you mean whose?

The Witness: I don't understand that question, sir.

The Court: Well, we have got both corporations involved here. We have got Weyl-Zuckerman and Company, we have got McDonald Island Farms, Ltd.

The Witness: Well, I was Weyl-Zuckerman and Company's representative.

The Court: You were Weyl-Zuckerman's? The record may show this, but I—it has been shown in testimony, my recollection is not very good at this point, but were you an officer of Weyl-Zuckerman as well as in McDonald?

The Witness: I was the manager.

The Court: Of both of them?

The Witness: I was the president of McDonald Island Farms and the manager of—I did everything. I can't—

Q. (By Mr. Livingston): Well, the manager of what?

A. Weyl-Zuckerman and also the manager of McDonald Island Farms.

(Testimony of John Zuckerman.)

Q. Well, to clarify it for the Court, let's analyze that a little further. [70]

As manager of the Weyl-Zuckerman and Company you were operating the Utah and Oregon farming endeavors of that company?

A. Yes, sir. Yes, sir.

Q. Is that right? A. Yes.

Mr. Nyquist: Your Honor, this is a point on which I don't think we should have leading questions.

Mr. Livingston: Well, I think it is already in evidence, your Honor. I just want to pinpoint it. However, I won't ask the leading questions.

Q. (By Mr. Livingston): In your position as manager of McDonald Island Farms, what were you actually doing?

A. I was running the company.

Q. But explain to the Court what the company's activities were?

A. It was farming. I was out supervising the farming, the planting, the harvesting of the crops, and everything that goes with the 6,000 acre farming project.

Q. Where?

A. In Stockton at McDonald Island.

The Court: When Mr. Schroeder dealt with you, I take it he understood you were in a capacity one way or the other to bring about a consummation of the activities involving these [71] mineral rights whether through one corporation or through the other?

(Testimony of John Zuckerman.)

A. Well, I did tell him that anything, naturally, that came up, I had to refer to the board of directors who had the power to act, but I was the messenger, at least.

Q. Now, did that conversation eventuate into a sale—strike that, please.

Was there a subsequent conversation or information from the Standard Oil Company as to whether this deal could be made?

A. Yes, sir.

Q. Now, at that time the mineral—Pardon me, your Honor.

At that time the gas rights under Henning Tract were owned by McDonald Island Farms, Ltd., were they not?

A. Yes, sir.

Q. And at that time the gas rights under the McDonald Tract were owned by Weyl-Zuckerman and Company, is that correct?

A. Will you say that again, please?

Q. At that time the gas rights under McDonald Tract were owned by Weyl-Zuckerman and Company?

A. Yes, sir.

Q. Yes. Now, in terms of thirteenths, can you tell us what the relative proportion was of the rights under the two [72] tracts?

A. Well, the rights underlaying the McDonald Tract were approximately 8/13ths and the rights underlying the Henning Tract were approximately 5/13ths. That is, in their relationship to each other.

Q. Yes. Now, will you state whether a dividend

(Testimony of John Zuckerman.)

of those mineral rights on the Henning Tract was declared by McDonald Island Farms, Ltd.?

A. Yes, there was, in December, some time, I don't know.

Q. And will you state whether that was done in connection with the prospective sale of those mineral rights but—those mineral rights to the Standard Oil Company or its designee?

A. Well, we knew we were going to sell at that time.

Q. And had you, in the meantime, been informed by Mr. Schroeder that a deal could be made or approximated?

A. Yes.

Mr. Livingston: I think you asked us to produce the deed to the Pacific Oil Company, Mr. Nyquist.

Q. (By Mr. Livingston): Now, I have just showed counsel a deed from Weyl-Zuckerman and Company from Weyl-Zuckerman—from—Pardon me, just a minute, if your Honor will indulge.

I have here a deed from Weyl-Zuckerman and Company to Pacific Oil Company covering the mineral rights that have [73] been the subject of your testimony. How does it happen that the Pacific Oil Company was named as the grantee?

A. I don't know.

Q. I mean, were you told anything on that subject?

A. I don't recall anything. All I know is that when the Standard Oil Company came to do business they dealt in the name of the Pacific Oil Company.

(Testimony of John Zuckerman.)

Q. That is what I am trying to develop. They told you that the transaction would be handled by the Pacific Oil Company?

A. That is correct.

Q. And now will you state the reasons why the dividend was declared by McDonald Island Farms of the mineral rights that were under Henning Tract?

Mr. Nyquist: Will you repeat that question, please.

Mr. Livingston: Mr. Reporter, please.

(Whereupon the question was read by the Reporter.)

A. This was the dividend in December of 1946?

Q. (By Mr. Livingston): Yes.

A. Well, that was done, No. 1, to put all of that—all of the mineral rights into one group so that we could transfer the title, so that—I say “we,” so that Weyl-Zuckerman and Company could transfer that title to the Pacific Oil Company as one unit which the—the Standard Oil Company had indicated [74] that they were only interested in buying the entire gas rights, and there is a reason for that that I would like to state, if I might.

Q. All right, go ahead.

A. They indicated at that time that they had some intention of bringing—I don’t like to further complicate this, but of bringing gas in from Texas in a pipeline, and they wanted to store gas from Texas under McDonald Island. Therefore, only a portion of that right would do them no good. They

(Testimony of John Zuckerman.)

had to have the ability to control that gas field as they saw fit, and they wanted the entire area under their control so they could do anything they pleased with it without having any stock—stock, or land or leaseholder rights to——

Q. Complicated? A. Complicated.

The Court: Well, assuming that that is true, all those rights could have been transferred to Standard by two deeds instead of one?

The Witness: Yes.

Q. (By Mr. Livingston): Now, go ahead and explain why the McDonald Island Farms, Ltd. didn't make the transfer direct to the Pacific or the Standard Oil Company?

A. Well, one very good reason we had is we didn't want to come under the provisions of an agreement that we had with [75] the Bank of America in connection with our deed of trust.

Q. Well, had you — will you explain that, please?

A. Yes. At the time, I, as president of McDonald Island Farms, Ltd., negotiated the loan from the Bank of America of \$720,000. It was a ten-year loan. That is, it was to be repaid in ten years. We were to pay an annual installment of some \$28,000 on part of the principal with interest at the rate of 4%.

There was a further agreement made that in any year where our profits, and I say "our" meaning McDonald Island Farms, Ltd., after taxes but prior to depreciation being taken off, exceeded the \$28,000, that they were to receive each year, we would

(Testimony of John Zuckerman.)

pay them 35% of such profit towards the retirement of the bonded indebtedness.

Had we done that——

Q. “Had we done * * *” what?

A. Had we come under that—had we had—had the sale of these gas rights been made by McDonald, they would have shown a substantial profit which would have been subject to this provision and, it is my understanding from our accountants, that that would have necessitated the payment of about \$50,000 to the Bank of America, which, by virtue of the dividend being in the hands of Weyl-Zuckerman Company, was not payable.

Q. What was the condition of McDonald Island Farms at [76] that time, the financial position of McDonald Island Farms at that time with respect to its ability to find \$50,000 in cash for that purpose? A. Well, it was not easy to find.

Q. Did the company have it available?

A. I don't think so. I don't remember. I don't think so.

The Court: You are speaking about the cash availability prior to the proposed sale to Standard Oil or Pacific Oil?

Mr. Livingston: Yes, your Honor. Now, the next——

The Court: It seems to me the true question is, what would the value be after the sale, not before.

Mr. Livingston: I am about to do that.

Q. (By Mr. Livingston): What was done—Strike that, please.

(Testimony of John Zuckerman.)

The purchase price received from the Standard Oil was approximately 690,000, isn't that right?

A. Yes.

Q. That was received by Weyl-Zuckerman and Company? A. Yes.

Q. What was done with that?

A. Used to pay debts with.

Q. All of it? A. Yes. [77]

Mr. Livingston: I have the record here, your Honor, for the purpose of demonstrating that these financial exigencies existed and to show the disposition of all this money to support Mr. Zuckerman's testimony in that respect.

I would like to offer in evidence——

The Court: But that was money received by Weyl-Zuckerman after the dividend had been declared. Now, if that dividend had not been declared and the mineral rights which McDonald held had been sold directly to Standard, McDonald would have had the proceeds of that sale?

Mr. Livingston: That is correct. Not all of it.

The Court: Not all of it, but that portion of the proceeds attributable to the mineral rights that were in McDonald and that portion of it would have been more than adequate, I take it, to make payment on principal to the Bank of America?

The Witness: That is correct.

Mr. Livingston: And——

The Court: And Zuckerman would have had any interest in that?

Mr. Livingston: That portion, but while——

(Testimony of John Zuckerman.)

The Court: Just a minute. I am addressing myself to the witness. And—well, there would have been no problem whatever, then, would there?

The Witness: Yes. Well, do you want me to answer? [78]

The Court: Yes, I do.

The Witness: The problem would have been that we would have had to turn over to the Bank of America \$50,000 which was badly needed in our business.

The Court: "We," you are now referring to McDonald?

The Witness: McDonald, yes, sir.

Mr. Livingston: Which was badly needed in the business?

The Witness: You mean in McDonald's business?

Q. (By Mr. Livingston): Yes, by virtue of this defendant not coming—or, I beg your pardon, of the sale price not coming to McDonald, did not become payable to the Bank of America?

The Court: Well, how was any of that proceeds available to McDonald? I understood that as a result of the dividend McDonald lost everything in connection with these mineral rights?

The Witness: Yes, sir.

Q. (By Mr. Livingston): The mineral rights went up to——

A. That is right, and that is where they were needed.

The Court: Well, you are talking about the needs of Weyl-Zuckerman, not the needs of McDonald, or

(Testimony of John Zuckerman.)

are you? You tell me what you are talking about.

The Witness: I don't want to appear stupid on this, [79] but there were various intercompany debts. One company owed another. There were advances made. I can't say at this moment what McDonald's debts were at that time but that was handled by another member of our company.

The thing that I do know is that that \$50,000 was badly needed in our business and we did not want to have it go out at that time. It was needed in McDonald, it was needed in Weyl-Zuckerman and Company, it was needed in all of our operations because 1946 had been a very bad farm year.

Q. (By Mr. Livingston): All right. One thing has been clarified and that is that you desired to avoid the obligation to pay \$50,000. That is, McDonald's obligation to pay \$50,000 to the Bank of America which would have been due if the—if McDonald had made the sale direct. That is clear, but the Court has another problem in mind. The Court suggests that if McDonald had made the sale McDonald would have had, at least temporarily in its possession, say, a couple of hundred thousand dollars representing the purchase price of the rights that were under the Henning Tract, so I would like you to explain to the Court why that money was needed and how it would have had to be used, regardless of who the recipient was?

A. I don't think I can answer that.

Q. You think Mr. Von Husen can?

A. Yes. [80]

(Testimony of John Zuckerman.)

Mr. Livingston: I offer this in evidence. This is the deed from Weyl-Zuckerman and Company to Pacific Oil Company.

Mr. Nyquist: No objection.

The Court: Admitted.

The Clerk: Exhibit 5.

(The deed referred to was marked and received in evidence as Protestant's Exhibit No. 5.)

Mr. Livingston: You may cross-examine.

Cross Examination

Q. (By Mr. Nyquist): Mr. Zuckerman, will you please enumerate the different partnerships and entities that were owned and held by the Zuckerman family during these years 1946 and 1947?

Mr. Livingston: You mean exclusive of strangers who are employees? In other words, you are confining it to the blood members, members of blood of the Zuckerman family?

Q. (By Mr. Nyquist): Let us say that we are confining it to members of the Zuckerman family during this period?

A. Are you referring to my family?

Q. Let's clarify that. Who is Maurice Zuckerman?

A. That is my father.

Q. Is he the Zuckerman whose name was used in Weyl-Zuckerman Incorporated?

A. Yes. [81]

Q. And what was his relationship to that company?

A. President.

(Testimony of John Zuckerman.)

Q. From its beginning throughout the years in controversy here? A. Yes.

Q. In the period of 1907 to 1946, thirty-nine years, and there was another corporation, Maurice—rather, M. Zuckerman, Inc., was that corporation also named after your father Maurice Zuckerman?

A. Yes, sir.

Q. And it was a stockholder in Weyl-Zuckerman, Inc.? A. Yes, sir.

Q. And then who were the officers of McDonald Island Farms in the years 1946 and 1947?

A. Well, I was president. This is my recollection, I believe that my father was vice president. I think Von Husen was secretary, that is—no—well, either he or one of the representatives of the Holly—no, that is right, during '46 and '47, that is correct.

Q. And did your father Maurice Zuckerman take an active part in the management of these businesses? A. Yes.

Q. Was he, in fact, the dominating individual in the management of these businesses throughout this period?

A. I don't think we had any dominating individuals. [82]

Q. When you testified on direct examination about the purposes or events which motivated certain actions on the part of these corporations, were those matters of which you had personal knowledge or which you had been told?

(Testimony of John Zuckerman.)

A. I think I had personal knowledge of everything that I discussed.

Q. You think you had? Did you have personal knowledge during these years 1946—well, during the year 1946? A. Of the what?

Q. Of the various reasons to which you testified that motivated the various transactions at that time? A. Yes, sir.

Q. And did you, at that time, understand those reasons? A. Yes.

Q. You are now the president of Weyl-Zuckerman and Company? A. No.

Q. You are an officer now?

A. No, there is no Weyl-Zuckerman.

Q. Oh, there is no Weyl-Zuckerman. I see. Well, you mean it was dissolved when?

A. In 1952, in September.

Q. In September of 1952?

A. That is correct.

Mr. Nyquist: That was after the date of the filing [83] of the petition in this proceeding, your Honor. I don't think that would be a complicating factor. I think under California law a corporation remains alive for five years for purposes of winding up, so I don't believe that the dissolution of the petitioner—it is my opinion in this matter that that would not complicate this matter.

The Court: Have its assets been completely distributed?

The Witness: Yes, sir.

Mr. Nyquist: We might have a transferee prob-

(Testimony of John Zuckerman.)

lem, although I think perhaps it is just as well if we get the transferor's liability fixed, anyway.

Q. (By Mr. Nyquist): Mr. Zuckerman, we issued a subpoena before we knew about the dissolution of Weyl-Zuckerman, and we thought we had served it on Weyl-Zuckerman to bring in certain books of accounts. Are they in the courtroom?

Mr. Livingston: We are responding to that subpoena. We are not——

Mr. Nyquist: It might facilitate matters if the revenue agent and the—Mr. Van Husen could locate the things that we are looking for in those books and not take the Court's time. I will just tell the agent what I am looking for.

Q. (By Mr. Nyquist): Mr. Zuckerman, concerning the transfers of surface rights in the Henning Tract to McDonald Island Farms, Ltd., in June of 1946, I understood your testimony on direct examination to be that one-third of that tract was already owned by McDonald, McDonald Island Farms, Ltd., is that correct?

A. Will you repeat your question?

Mr. Nyquist: I will ask the Reporter to read it.

(Whereupon the question was read by the Reporter.)

A. No, that is not correct.

Q. (By Mr. Nyquist): Let me get this straight. In June of 1946 didn't McDonald own one-third of the—Oh, I see. I referred to the Henning Tract. I should have referred to the McDonald Tract.

Now, I will ask you the same question with re-

(Testimony of John Zuckerman.)

spect to the McDonald Tract. Prior to these transfers in June of 1946, was it your testimony that McDonald Limited owned one-third of the surface rights in the McDonald Tract?

A. Yes, sir.

Q. Are you sure of that? A. Yes.

Q. And Weyl-Zuckerman owned one-third of the surface rights in the McDonald Tract which was transferred to McDonald, Limited in June of 1946, was that your testimony?

A. I think it was.

Q. And you are sure of that? [85]

A. I—I'm getting to the point where I'm not sure about anything about this now.

Q. And you said that one-third of the McDonald Tract was owned by the Zuckerman Potato Company, a partnership? A. Yes.

Q. And that the Zuckerman Potato Company transferred its one-third to McDonald Island Farms at the same time in June of 1946, was that your testimony? A. Yes.

Q. And you are sure of that?

A. Well, it is my best recollection.

Q. I call your attention to Exhibit 1-A, Corporation Income Tax Return of Weyl-Zuckerman for the Year 1946, Schedule C, Sales of Capital Assets, and I call your attention to an item appearing thereon under the caption, "Sold to McDonald Island Farms, Ltd., wholly owned subsidiary, land, Henning Tract * * *" followed by certain amounts, and also the statement, "Two-thirds undivided in-

(Testimony of John Zuckerman.)

terest in the surface rights to the McDonald Tract."

Now, I ask you whether that may refresh your recollection as to who owned the McDonald—the surface rights in the McDonald Tract prior to these transfers to McDonald Island Farms in June of 1946?

A. Well, it would seem to indicate that it was owned by Weyl-Zuckerman and Company. [86]

Mr. Livingston: What was that last?

(Record was read by the Reporter.)

Q. (By Mr. Nyquist): Do you recall who owned it?

A. Well, I know that it was owned by Zuckerman Potato Company—You are talking about the one-third that I referred to?

Q. For the—so that the witness will not be unduly confused, I call his attention to the fact that paragraph 5 in the stipulation touches in part upon this. It says that:

"As of August 11, 1943, McDonald, Ltd. declared a dividend in kind to its stockholders, as the result of which Weyl and Holly each received a one-third ($\frac{1}{3}$) interest in the surface rights of the McDonald Tract * * *"—

A. Oh, I can answer that.

Q. You can answer it now?

A. No, go ahead please, will you? I am still confused.

Q. "* * * McDonald, Ltd. retaining the remaining one-third ($\frac{1}{3}$) of the surface rights and all of the mineral rights. As of about the same date Holly

(Testimony of John Zuckerman.)

gave Weyl an option to purchase Holly's said one-third ($\frac{1}{3}$) interest in said surface rights for \$120,280.30. Said option was transferred to Zuckerman Potato Co., a partnership, which exercised it and Holly conveyed to Zuckerman Potato Co. on December 27, 1944. [87]

So, as of December 27th, 1944, we have one-third in each of the three entities, Zuckerman Potato Company, the partnership; one-third in McDonald Island Farms; and one-third in Weyl-Zuckerman. But, did something occur in between those dates whereby Weyl-Zuckerman had acquired two-thirds of it at the time of the sale to McDonald Island Farms? A. I don't remember.

Q. Are your income tax returns prepared from the books and records of the company?

A. Yes, sir.

Q. Well, I— as between your recollection in the matter and your income tax return, which would you be inclined to believe would be correct?

A. The income tax return.

Mr. Nyquist: Thank you.

(Discussion off the record.)

Q. (By Mr. Nyquist): On direct examination you testified as to reasons for putting all of the McDonald Island into the hands of the—or into the McDonald Island Farms, Ltd., and one class of reasons that you stated was what you called financial reasons, and I understood your testimony to be that Zuckerman Potato Company was engaging in certain risky operations, is that it? A. No.

(Testimony of John Zuckerman.)

Q. Weyl-Zuckerman was engaging in certain risky [88] operations? A. That is right.

Q. And you wished—that is, the people in control of the two corporations wished to put the operations that were not considered so risky in the hands of the one corporation, which was McDonald Island Farms, so that they would not be subject to the risk that was involved? A. No, sir.

Q. Will you explain that, then? Perhaps I didn't understand it.

A. All farming is a very risky venture, which you must know.

Q. Yes.

A. And, we sometimes may wish to separate our risks in the one instance. The other thing was that these—you take operations that were a new venture, they were untried—I think I used the word untried rather than risky.

Q. Yes.

A. That is, if that is what you want, the explanation of the word "risky" I said "untried."

Q. Untried? In other words, you considered there were possibilities of heavy loss there?

A. Yes.

Q. And you didn't want to subject the property to those hazards, is that it? [89]

A. That is one reason.

Q. And you understood these were the reasons that you understood at that time?

A. Yes, some of them. There were many others.

Q. Well, I have seen occasions when a corpora-

(Testimony of John Zuckerman.)

tion would put risky, hazardous properties in the hands of a subsidiary so that the parent corporation wouldn't be subject to the risk of the subsidiary's business, but could you explain to the Court how you intended that would work when these risky businesses were in the hands of the parent company?

A. We had no way of working anything. That is a way of separating the business.

Q. One of these you testified to on direct examination is, you considered these Utah operations somewhat uncertain and risky, and you wanted to, more or less, insulate them from the other operation? A. Yes.

Q. Now, I am asking what you accomplished by putting them in the hands of the parent corporation? Who are you protecting from what?

A. We wanted—we didn't want to protect anybody from anything. We did what we wanted. We separated them from McDonald Island Farms.

Q. What was the purpose of this separation again, this financial purpose we are discussing? Will you explain that [90] financial purpose with respect to the Utah operation?

A. There are many, in addition to the one I said. One is——

Q. Let me call your attention—I am referring now only to your testimony about these operations up in Utah or Idaho, whichever you stated.

A. The minute we began operating in Utah we were subject to Utah State income taxes, as you

(Testimony of John Zuckerman.)

know. By keeping the Utah operation or the California operation separate from the Utah operation they did not get involved in our Utah State income tax return, neither did they get involved in our Oregon State income tax return. That was one financial reason, so as not to complicate our picture.

The other was to have the Stockton farming operations conducted by a separate corporation wholly on its own, able to do its financing without the untried operations being included in its activities.

Q. Well, didn't you testify on direct examination that you considered these untried operations, that there was considerable risk of loss in those operations?

A. I probably described them as being risky, yes, or untried.

Q. And was that one of the reasons you gave for segregating the assets of the two corporations in this way?

A. Yes, yes. [91]

Q. And are you able to offer any further explanation as to what you had in mind as to the purpose, in putting the risky, the operations which you termed the risky or the uncertain ones in the hands of the parent corporation?

A. No more than what I have said. I could—I could add something to that. I mean, if you want more reasons there are many of them.

Q. No, I am merely after a clarification of this one reason we were talking about.

(Testimony of John Zuckerman.)

A. I thought I gave sufficient reasons, but there are many more.

Q. Now, in connection with the sale of the two-thirds interest by Weyl-Zuckerman to McDonald Island Farms in 1946, this purported sale in June of 1946 of a two-thirds interest—No, wait a minute. Excuse me. I misspoke myself.

In connection with this sale of the entire Henning Tract and the sale of the two-thirds interest in the surface rights of the McDonald Tract by Weyl-Zuckerman to McDonald Island Farms in June of 1946, was the purchase price paid in cash?

A. I don't remember.

Q. Turning now to the negotiations with Standard Oil, who represented the petitioner and the related corporation in those negotiations?

A. I don't—I am sorry, I don't know who the petitioner [92] is.

Q. Weyl-Zuckerman.

A. Okay, and at what time, sir?

Q. In the negotiations—throughout the negotiations, at any time throughout the negotiations, between the owners of these lands and Standard Oil Company for the—that ultimately led up to the sale in January, 1947?

Mr. Livingston: Objection, assuming something not in evidence. There is no testimony there were negotiations. There was testimony to two conversations.

Mr. Nyquist: There was testimony as to an offer and a counter-offer, your Honor.

(Testimony of John Zuckerman.)

Mr. Livingston: No, your Honor, I dispute that. The testimony is that in November, 1945, Mr. Schroeder said \$500,000 and the answer was "Refused, as we do not own them." All testimony was that in December of 1946 Mr. Schroeder said, \$500,000 too much; Mr. John Zuckerman said it is not enough, and the suggestion was made of six fifty.

The Court: Well, that sounds like a negotiation to me.

Mr. Livingston: Well, it doesn't sound like it to me, your Honor. Negotiation, my conception of it is a series of conversations in which parties were engaged, one with the other, and which the objective, which is in mind, is never fully abandoned. [93]

The Court: I think you are quibbling. The question obviously relates to these discussions, and I think it sufficiently identifies them.

Q. (By Mr. Nyquist): Will you answer that question, please? A. What was it?

Q. Who represented the Weyl-Zuckerman Company and/or McDonald Island Farms in negotiations or conversations, if you prefer, which led up to the sale, which is the subject of this controversy?

A. And when, sir?

Q. At any time during the negotiations? I will make the question a little broader.

Who, at any time, discussed with Standard Oil the possibility of selling to Standard Oil the remainder of the gas rights which were retained—which were owned by Weyl-Zuckerman and McDonald Island Farms?

(Testimony of John Zuckerman.)

A. Well, I presume Holly Sugar people, Maurice Zuckerman, I.

Q. Do you know whether—Were you present at all conversations? A. No.

Q. There were conversations at which you were not present?

A. I don't know, but at the negotiation at which I was [94] present I represented Weyl-Zuckerman.

Q. Was Maurice Zuckerman with you on any of those occasions?

A. Not to my recollection. I would, again, like to repeat this was nine or ten years ago and some of these things aren't as clear as they could be.

Q. After the sale had been agreed upon, or after the terms of the sale had been generally agreed upon and it came time to agree upon the mechanics of the sale, the course the conveyances were to take, whose suggestion was it that the gas rights all be transferred to Weyl-Zuckerman and from Weyl-Zuckerman to Standard Oil's subsidiary?

Mr. Livingston: I think counsel makes an error in that respect, not intentionally. All the gas rights were not transferred to Weyl-Zuckerman and Company. Weyl-Zuckerman and Company at this time owned what we determined to be 8/13ths of it. It is only the 5/13ths.

Mr. Nyquist: The sentence was not phrased very aptly.

Q. (By Mr. Nyquist): In which the gas rights were transferred to Weyl-Zuckerman, so that Weyl-Zuckerman could convey all the rights which were

(Testimony of John Zuckerman.)

being sold to Standard Oil, who suggested that procedure?

A. It was the result of mutual discussion.

Q. But my question was, who suggested that the transfer [95] take that indirect rather than direct course? A. I don't know.

Q. Were you there?

A. Not knowing just when the suggestion was made, I don't know whether I was there or not. I know I was in on all of these deliberations and determinations so I must have been there.

Q. Well, did Standard Oil make any suggestion as to how the—the direction the conveyances should take? A. No.

Q. Did you, or any of those representing your side, make any suggestion?

Mr. Livingston: To whom, you mean Standard Oil?

The Witness: I don't understand the question. I am sorry.

Mr. Livingston: I would like——

Mr. Nyquist: The point——

Mr. Livingston: Pardon me, go ahead.

Mr. Nyquist: The point is, once a deal had been made with Standard, Standard was to purchase these gas rights at a certain total figure which was allocable between the two tracts and at an agreed basis; there came the matter of putting the deal into effect, making the conveyances. In the ordinary course of business a seller conveys to a buyer, or whoever has the property conveys to whoever is

(Testimony of John Zuckerman.)

going to get it, but [96] here we have the extra step in the proceeding of McDonald Island Farms making a transfer to Weyl-Zuckerman which then made a transfer to Pacific Oil Company, the subsidiary of Standard.

Now, I am trying to find out how that got into the picture, who suggested it. Is that clear?

A. It is clear, yes.

Q. All right, then, what is your recollection in the matter?

A. I don't know. I'm trying to answer as best I can, but I simply don't remember some of the details that happened eight years ago.

Q. All right. And, you can't remember whether cash was paid on the earlier transfers of the surface rights to McDonald Island Farms?

A. No, I don't.

Q. Now, about this transfer from McDonald Island Farms to Weyl-Zuckerman of the Henning gas rights, can you tell me the exact date upon which it was determined that that would be done?

A. No.

Q. Do you know whether the decision was reached by December 27th of 1946—Let's say December 21st of 1946?

A. I don't know.

Q. You don't know? Do you know whether the deed was [97] executed before January 10th of 1947?

A. The deed from McDonald to Weyl-Zuckerman and Company?

Q. Yes.

(Testimony of John Zuckerman.)

A. I think it was, but I couldn't swear to it.

Mr. Nyquist: Do you have that deed with you?

Mr. Livingston: Yes.

Mr. Nyquist: I have here a deed which Petitioner's counsel has just handed me which appears to be the deed we are discussing from McDonald Island Farms to Weyl-Zuckerman and Company and I note thereon that it is recorded at the request of McDonald Island Farms, Ltd. on January 10th, 1947, at twenty-five minutes past 1:00 o'clock p.m.

May it be stipulated that that was the date on which it was recorded?

Mr. Livingston: Yes.

Mr. Nyquist: And I further note that the deed states on its face that it has been executed on the 21st day of December of 1946 and that it is signed by you.

Q. (By Mr. Nyquist): Can you tell me whether that deed—can you tell me, definitely, whether you have any recollection whether that deed was executed, actually executed on the date it bears or on December 10th, 1947—or rather, January 10th, 1947? [98] A. I couldn't tell.

Q. You couldn't tell? A. No.

Mr. Nyquist: Your Honor, may we have a recess at this time so we can get the book entries straightened out and that will finish up with this witness I believe.

The Court: We will take a short recess.

(A short recess was taken.)

Mr. Nyquist: Without taking the time of this

(Testimony of John Zuckerman.)

witness to identify them, I wish to offer the documents which the Petitioner has produced as Respondent's Exhibit next in order. I offer a group of documents consisting of a ledger sheet, a copy of a deed——

Mr. Livingston: Was that ledger sheet—have you finished with that?

Mr. Nyquist: Yes.

Mr. Livingston: Describe them a little more completely for the record.

Mr. Nyquist: I am going to describe them as relating to this particular piece of property.

Mr. Livingston: Thank you.

Mr. Nyquist: A ledger sheet and a loose leaf journal entry. It is a piece of paper which contains a journal entry showing a transfer of the Henning Tract to McDonald Island Farms and there is stapled to that a deed, [99] a copy of a deed, which apparently was kept there by the taxpayers for the purpose of identifying the sale to which this related, not part of a book entry but it apparently is for identification purposes.

Mr. Livingston: What is the date of the deed?

Mr. Nyquist: The date of the deed is June 27th, 1946. The date of the journal entry is June 27th, 1946, and the ledger sheet is a ledger sheet with respect to the Henning Tract and shows thereon a value at which it was carried on the Petitioner's books and the transaction relating to the sale.

The Court: This proposed exhibit consists of three——

(Testimony of John Zuckerman.)

Mr. Nyquist: Consists of three pieces of paper.

The Court: It consists of three pieces of paper.

Mr. Livingston: No objection.

The Court: Admitted.

The Clerk: Exhibit C.

Mr. Livingston: I understand this is offered as a part of the Respondent's case?

The Court: Respondent's Exhibit.

Mr. Nyquist: As Respondent's exhibit to show how Petitioner treated this on Petitioner's books. I don't think counsel can minimize the effect of the evidence by his equivocation. [100]

As Respondent's Exhibit next in order I have a ledger sheet from the books of McDonald Island Farms, Ltd., and a looseleaf journal entry; the journal entry showing the purchase—the purported purchase of the same land on June 27th, 1946, and the ledger sheet showing how it was carried on the ledger of McDonald Island Farms, Ltd.

Mr. Livingston: No objection.

The Court: Admitted.

The Clerk: Exhibit D.

(The deed, journal entry and ledger sheet referred to were received in evidence as Respondent's Exhibit No. C.)

(The ledger sheet and journal entry referred to were received in evidence as Respondent's Exhibit No. D.)

Mr. Livingston: Am I correct, Exhibit C are records of Weyl-Zuckerman and Company and D of McDonald Island Farms?

(Testimony of John Zuckerman.)

Mr. Nyquist: That is correct.

Q. (By Mr. Nyquist): Mr. Zuckerman, do you know the value at which the Henning Tract was carried on the books of Weyl-Zuckerman?

A. No.

Q. I show you Exhibit C, the ledger sheet, the first line of which under the date of January 15th, 1936, states, 2707 acres at \$812,100, and it has been stipulated this is the ledger sheet with respect to the Henning Tract. [101]

Mr. Livingston: No, no, I haven't stipulated to that.

Mr. Nyquist: You haven't objected to the Exhibit which was introduced as such.

Mr. Livingston: No objection to the Exhibit, there was no stipulation to it.

Q. (By Mr. Nyquist): This is the ledger sheet with respect to the Henning Tract. Do you know the value at which—which was placed upon this land for the purpose of the sale to McDonald Island Farms?

A. Its cost value of 338,000.

Q. 338,000? A. Correct.

Q. How was that value arrived at?

A. That was the cost.

Q. That was the cost? A. Right.

Q. To Weyl-Zuckerman?

A. As I understand it, yes.

Q. This eight thousand, or rather, \$812,100 was not the cost? A. No.

Mr. Livingston: Just a moment. Well, no objection, it has been answered. Let it go. [102]

(Testimony of John Zuckerman.)

Q. (By Mr. Nyquist): That was an appraised value that was put on it at some later date?

Mr. Livingston: Object. The witness has not identified the documents. The witness cannot be cross-examined on the basis of documents which were not produced on direct examination. These documents are not prepared by the witness and therefore he is not responsible for them and I don't think it is proper cross-examination to ask him concerning the contents of documents that have not been identified by him. There is an explanation. We have got the man who kept the books. He is here and available for this interrogation and I intend to ask him those questions.

The Court: I think this is proper cross-examination.

Q. (By Mr. Nyquist): I am asking you about this \$812,100 figure. You say that was not the cost of the land? A. No.

Q. Was that an appraised value that was put on the land at some date?

Mr. Livingston: I wish to examine voir dire. May I, your Honor.

The Court: I think it is appropriate at this time for counsel to pursue this with the witness.

Mr. Nyquist: Your, Honor, this is not a third [103] party witness, this is—this witness was, during this period the manager and I believe still is the manager—no, the corporation is dissolved, but he is here as a party in interest, in effect, and he has purported, on direct examination—

(Testimony of John Zuckerman.)

The Court: You may continue.

Mr. Livingston: May I make one suggestion, your Honor? Of all the things he said he did for McDonald, that is one thing he didn't include, and that is keeping its books. Now, this is a bookkeeping transaction, a bookkeeping entry.

Mr. Nyquist: That is objected to as leading the witness.

The Court: You have been leading the witness altogether too much, Mr. Livingston, and all the way through direct you have been putting words into his mouth and there has been practically no objection by the Government on that and I have sat by and let you do it, and I think it is wholly improper for you to try to put words in the witness's mouth when the witness is on cross-examination. This goes to the weight of the witness's testimony. You are going to get him on redirect. You can bring out all these matters.

Mr. Livingston: Has your Honor the remotest idea that anything I have said in the last five minutes is intended as a means of coaching Mr. Zuckerman as to what he is about [104] to testify to? Because, if you have, I wish you would dismiss it from your mind.

The Court: You are going to get the witness on redirect to the extent that these matters call for further clarification you can elicit that on redirect examination if you have any question as to any specific question you may make the objection. Now, apparently there are—this property was carried on

(Testimony of John Zuckerman.)

the books at figures that vary sharply from another figure that was used in this transaction. Now, it is wholly proper to inquire of this witness who has played a dominant role in the affairs of this enterprise or these enterprises for an explanation. Now, if it turns out that he can't give any explanation that is that, but it certainly is appropriate to make the inquiry.

Mr. Livingston: I have a little difficulty in following one comment of the Court. You say this property is carried on the books at a figure that is variant from some other figures that have been disclosed by the defendant. If that is true, it has escaped my attention.

The Court: Well, we have got two figures here. We have got a figure in the amount of some 338,375.

Mr. Livingston: That is the cost.

The Court: And then we—what was the other one? Then we have another figure in the amount of \$810,000.

Mr. Livingston: That is the first time the figure [105] has appeared and it has come from a book-keeping record.

The Court: Well, the witness may be interrogated about those two figures and asked to explain the difference between them. If he can't explain, that is that, but if he can this is cross-examination and counsel is entitled to interrogate him with a fair degree of latitude that would probe into the apparent discrepancy between those two figures and where they came from.

(Testimony of John Zuckerman.)

Mr. Nyquist: Can you find that question or shall I rephrase it, Mr. Reporter?

(Question read by the reporter.)

Mr. Nyquist: I will rephrase that question.

Q. (By Mr. Nyquist): Can you tell us what that \$812,100 figure represents? A. No.

Q. How do you know it doesn't represent the cost, then?

A. Because I know the cost of three hundred and thirty-eight——

Q. How do you know that?

A. Well, I was—I just know it is the cost.

Q. How do you know, is my question? What was the source of your information? It obviously wasn't this book page.

A. I apparently satisfied myself as to that somewhere in the course of my business. [106]

Q. I see, and you have remembered it for how many years? A. Oh, about 20.

Q. About 20 years you have remembered that the cost of that property—I see.

When did the Weyl-Zuckerman acquire that property? A. Oh, around 1930.

Q. Around 1930? And were you in the business around 1930? A. I came in in 1932.

Q. In 1932? You weren't there at the time it was acquired? A. No.

Q. Where did you get your information as to cost?

A. I think at various times I asked our auditor, Mr. Von Husen, our treasurer.

(Testimony of John Zuckerman.)

Q. Then your statement, your testimony as to the cost of the property is on the basis of statements made to you by some other party, is that correct?

A. Yes.

Q. Is that true of other parts of your testimony?

Mr. Livingston: Object, too general.

Mr. Nyquist: I think it is very specific, your Honor.

Mr. Livingston: "Other parts", what parts?

Mr. Nyquist: Any parts. [107]

Q. (By Mr. Nyquist): Is it true of any other part of your testimony?

Mr. Livingston: It is still too general, your Honor. It is not a specific question at all.

The Court: I will let the question stand and if the answer is in the affirmative it should be followed up with further questions pinpointing it.

The Witness: What was the question?

Q. (By Mr. Nyquist): Were any other parts of your testimony here based upon statements made to you by others?

A. Well, I testified that somewhere or other Mr. Schroeder made an offer of \$500,000. That would be a statement made to me by someone.

Q. No, you there, you heard that.

A. Anything that I said I was present at. Certainly it wasn't because somebody else told me that.

Q. You were present, that is not the type of inquiry——

A. I don't think I testified to anything that I wasn't present.

(Testimony of John Zuckerman.)

Q. You stated that the cost basis was the sales price here?

A. I have had occasion at various times in our business to ask the proper person in our business from whom I was ascertaining that information what the cost was and he told me [108] this figure of three hundred and thirty-some thousand dollars, but when it was I couldn't tell you.

Q. You were manager of Weyl-Zuckerman and Company on the date of that transaction, were you not? A. Yes.

Q. Who fixed that figure of \$338,375 in which the 2700 acres were sold?

A. The Board of Directors.

Q. The Board of Directors? Who suggested that figure? A. I don't know.

Q. You don't know where that figure came from?

Mr. Livingston: Well, I don't understand that question. Maybe the witness does.

A. I don't know who suggested it. I know where it came from but it is the cost of the property.

Q. (By Mr. Nyquist): You know it is the cost because someone told you it is the cost, is that right?

A. Yes, yes.

The Court: Well, was that property acquired at a time before the gas was discovered?

The Witness: Sir, it was acquired before I was born, originally.

Mr. Nyquist: Now, your Honor, the stipulation shows that it was acquired back around about 1912

(Testimony of John Zuckerman.)

by this taxpayer, [109] I believe, and this gas was first discovered in the middle '30's.

Mr. Livingston: Were you alive in 1912?

The Witness: Two years old.

The Court: Well, the stipulation merely states that the Henning Tract was acquired by Weyl prior to 1932. It doesn't indicate when, but it was acquired at a time prior to the discovery of gas?

The Witness: Yes, sir.

Mr. Livingston: The fact is——

The Court: So that——

Mr. Livingston: Pardon me.

The Court: So that whatever the purchase price may have been, original purchase price on that tract, it would have been with respect to land as such rather than as to land with valuable mineral rights under it, the gas not having been discovered?

The Witness: No, but it did have the mineral rights at the time of the purchase.

The Court: Well, yes, whatever mineral rights were there with the purchase.

The Witness: Yes, sir.

The Court: Well, but the mineral, the gas not having been discovered, would not have figured in the purchase price? [110]

The Witness: I guess not.

The Court: So that upon the discovery of gas, the value of the property would then be greater than immediately prior to discovery of gas. Would that be a fair statement?

The Witness: Well, there are other—there are

(Testimony of John Zuckerman.)

other things that could come into it, but I suppose it would be ordinarily a fair statement, yes.

Q. (By Mr. Nyquist): Mr. Zuckerman, you were president of McDonald Island Farms during the years '46 and '47? A. Yes, sir.

Q. Is McDonald Island Farms now still an active corporation? A. No, sir.

Q. Were you its president up to the date of its dissolution? A. Yes.

Q. I show you the ledger sheet of McDonald Island Farms with respect to this same tract and call your attention to the fact that it shows acquisition of this land at the figure of \$338,375 in June of 1946, and can you tell me what that March 31st entry, can you read the words in that, March 31st, 1931, entry there?

A. It looks like "UFD".

Q. UFD? Have you any idea what that abbreviation means? [111] A. No, sir.

Q. Who kept these books?

A. Mr. Von Husen.

Q. Mr. Von Husen, the——

A. The secretary of the company.

Q. That is the gentleman at the end of the table there (indicating)?

A. Yes, sir.

Q. That is, he was in charge of the books, who the actual bookkeeper was, it might have been somebody else? A. Yes.

Q. But he would be able to explain that?

A. I think so, yes.

(Testimony of John Zuckerman.)

Mr. Nyquist: I have no further questions of this witness, your Honor.

Mr. Livingston: Let me inquire of counsel, he brought up the existence of a corporation called M. Zuckerman, Inc. May I inquire whether counsel attaches any significance on the materiality of that corporation? If he does I will investigate it and explore it. If he doesn't—I think it is immaterial, but I want to be prepared.

Mr. Nyquist: It apparently had no active part to anything here. I don't attach any particular significance to it.

Mr. Livingston: Well, how about the fact Weyl-Zuckerman [112] and Company was dissolved in 1952, is that material to the issues in this case?

Mr. Nyquist: It doesn't appear to be material unless it affects the jurisdiction of the court in any respect. I haven't looked into that.

The Court: I suggest you make up your own mind whether these things are material or not, Mr. Livingston, and you carry on your examination in any light you form on it.

Mr. Livingston: All right. No redirect examination. Step down, Mr. Zuckerman.

I offer in evidence, if your Honor please, a deed dated June 27th, 1946, from Maurice Zuckerman, Herbert G. Zuckerman, Roscoe C. Zuckerman, as trustees to McDonald Island Farms, Ltd., undivided one-third interest in and to the property which I think we can agree is the—describes the surface rights of McDonald.

Mr. Nyquist: That accounts for the missing one-third?

Mr. Livingston: No, there is no missing one-third. At least I have never missed it.

Mr. Nyquist: No objection.

The Court: Admitted.

The Clerk: Exhibit 6.

(The deed above referred to was marked and received in evidence as Petitioner's Exhibit No. 6.) [113]

Mr. Livingston: I now offer in evidence the deed dated June 27th, 1946, from Weyl-Zuckerman and Company to McDonald Island Farms, Ltd. of an undivided one-third interest in and to the same property that is described in the deed just offered in evidence.

Mr. Nyquist: No objection, your Honor.

The Court: Admitted.

The Clerk: Exhibit 7.

(The deed above referred to was marked and received in evidence as Petitioner's Exhibit No. 7.)

Mr. Livingston: I offer in evidence the minutes of the meeting of the Board of Directors of McDonald Island Farms, December 21st, 1946, which embody the resolution for a declaration of dividend of the mineral rights under Henning Tract.

Mr. Nyquist: That is objected to, your Honor, on the ground it hasn't been properly identified.

Mr. Livingston: I submit the objection.

Mr. Nyquist: I said I object on the grounds it hasn't been properly identified, your Honor.

The Court: What do you say to that?

Mr. Livingston: Well, it is from the same book which——

Mr. Nyquist: I stipulated the earlier minutes but——

The Court: Not stipulating to this one? [114]

Mr. Livingston: The minutes are from the same book, is the same, it hasn't changed since the stipulation of counsel. If he wants to stipulate I could put in—I could put Mr. Von Husen on the stand.

The Court: His objection is technically accurate, and, of course, I will have to sustain the objection.

Mr. Livingston: Mr. Von Husen, will you take the stand please?

Whereupon,

JOHN VON HUSEN

called as a witness for and on behalf of the Petitioners, being first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Have a seat, sir, and state your name and address, please?

The Witness: My name is John Von Husen, V-o-n H-u-s-e-n, 1892 West Willow Street, Stockton, California.

Q. (By Mr. Livingston): On December 21, 1946, were you the secretary of McDonald Island Farms, Ltd.?

A. Yes, sir.

Q. I show you a document or book entitled Mc-

(Testimony of John Von Husen.)

Donald Island Farms, Ltd. and ask you what that book is?

A. It is the minute book of the corporation of McDonald [115] Island Farms, Ltd.

Q. Were you present at the meeting that was held on December 21, 1946? A. Yes, sir.

Q. Will you state whether these minutes reflect the occurrences at that meeting? A. They do.

Q. And is that your signature?

A. Yes, sir.

Q. Your signature appended to the minutes?

A. Yes, sir.

Mr. Livingston: I now offer—any cross examination?

Cross Examination

Q. (By Mr. Nyquist): Mr. Von Husen, can you tell me when those minutes were prepared?

A. Right at the end of the meeting.

Q. You mean you sat down and typed these up at the end of the meeting?

A. Probably the next morning.

Q. And are you testifying that the meeting was held on this exact date, December 21, 1946?

A. Yes, sir.

Q. And that the parties who are listed here were present [116] on that exact date? A. Yes.

Mr. Nyquist: No further questions.

Mr. Livingston: I offer the minutes of December 21, 1946, in evidence.

Mr. Nyquist: No objection, your Honor.

The Court: They will be received.

(Testimony of John Von Husen.)

The Clerk: Exhibit 8.

(The minutes above referred to were marked and received in evidence as Petitioner's Exhibit No. 8.)

Mr. Livingston: Step down, please, Mr. Von Husen.

(Witness excused.)

Mr. Livingston: Now, in order to avoid unnecessary expansion of the record, I think we can agree as to their content, unless counsel wants them to go in as they stand.

The Court: Well, you submitted those two pages as an exhibit. Those two pages are now part of the record.

You give the book to the clerk, he will stamp it. If the parties wish, I will give you permission to withdraw the book and substitute a photostatic copy of the two pages.

Mr. Livingston: May I suggest this——

The Court: Or, if you desire, you may leave the entire book.

Mr. Livingston: Your Honor, if you recall, we agreed [117] the same book, you were talking about before, that the book might be left here, that the reporter was to transcribe this into his notes, certain paragraphs.

The Court: Those are not exhibits. It has been admitted as Exhibit 8.

Mr. Livingston: Would it be agreeable to have the exhibit copied into the record, or would you

prefer it—I am sorry if I am offending the Court. I assure you I am not doing it deliberately.

The Court: These two pages are now Exhibit 8. They have been received in evidence and all I can allow you to do is either to leave the book or I will let you withdraw the book, take a photostatic of those two pages or make any other kind of copy you wish, providing the Government is satisfied as to the accuracy of the two pages, and resubmit them.

Mr. Livingston: I desire to offer in evidence a deed dated December 21, 1946, and recorded on January 10, 1947, McDonald Island Farms, Ltd. to Weyl-Zuckerman and Company, Ltd. and after counsel has had an opportunity to examine it we may be able to agree that the property therein described is the mineral rights under Henning Tract.

Mr. Nyquist: I have no objection, but I am not stipulating as to the description. I haven't had a chance to study that out. It is the date you say the Henning Tract was transferred, but I didn't follow that description through. [118]

Mr. Livingston: Well, I will offer this in evidence, your Honor, please.

The Court: Admitted.

The Clerk: Exhibit 9.

(The deed referred to was marked and received in evidence as Petitioner's Exhibit No. 9.)

Mr. Livingston: I offer in evidence a deed dated June 27th, 1946, from Weyl-Zuckerman to McDonald Island Farms, Ltd.

Mr. Nyquist: No objection.

The Court: Admitted.

Mr. Livingston: Can we stipulate that the 2707 acres described in this deed comprise the so-called Henning Tract?

The Clerk: Exhibit 10.

Mr. Nyquist: No, I would rather you had someone identify that.

Mr. Livingston: All right.

All right, Mr. Zuckerman, will you step forward, please?

Whereupon,

JOHN ZUCKERMAN

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was further examined and testified as follows: [119]

Further Direct Examination

Q. (By Mr. Livingston): I show you Exhibit 10 and call the attention to the description of 2,707 acres and so forth. Will you tell me what property that is?

A. Henning Tract.

Q. I show you Exhibit 9 and call your attention to the description of mineral rights in the same 2,707 acres, I believe. Can you tell us what that property is?

A. Henning Tract.

Mr. Livingston: You may cross examine.

Mr. Nyquist: No questions.

Mr. Livingston: Mr. Von Husen, would you take the stand? You have been sworn.

Whereupon,

JOHN VON HUSEN

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was further examined and testified as follows:

Further Direct Examination

Mr. Livingston: May I have Exhibit C and D, please?

Q. (By Mr. Livingston): I call your attention to Exhibit C, the first page on that exhibit is—what kind of a sheet is that?

A. That is an entry sheet. [120]

Q. Entry sheet? Can you tell me in whose handwriting that is?

A. It is in my own handwriting.

Q. Will you explain the figures that appear on that page, please?

A. It records the transfer of the Henning Tract property to McDonald Island Farms by Weyl-Zuckerman and Company. This is the entry from the Weyl-Zuckerman and Company books.

Q. Under what date? A. June 27th, 1946.

Q. Go ahead, explain those figures.

A. The property was transferred by Weyl-Zuckerman and Company to McDonald Island Farms at the original cost of \$125 per acre and the increment for which this land had been carried on the books was charged off to the surplus account of Weyl-Zuckerman and Company.

Q. And the cost was what?

A. The cost was \$338,375.

(Testimony of John Von Husen.)

Q. And the increment was what?

A. The increment was \$473,475.

Q. Now, will you explain to the court what that transaction is, involves the development of an increment on the books of the company with its inflection of surplus?

A. I referred to the old ledger and noticed that the land was bought originally in 1912 at \$125 per acre for a total [121] of \$338,375. In 1913, on February 28th, the ledger records an increment in land value of another \$125 per acre or \$338,375, and on October 30th, 1926, an additional increment in the value was recorded of \$50 per acre, the total of \$135,350.

The Court: Well, what is meant by these—this term “increment”?

The Witness: That is the notes I found on the ledger. I don't know just what was meant by that. I didn't make those entries myself.

Q. (By Mr. Livingston): Now, I show you a portion of Exhibit D, and I will ask you—which is headed Land, 1946, June 30th. Will you tell me in whose handwriting that was written?

A. That is Mr. Gibbons', who is the bookkeeper in our Stockton office.

Q. And is he under your supervision?

A. Yes, sir.

Q. Was he that time? A. Yes, sir.

Q. Are you familiar with the figures that appear on that page? A. Yes.

(Testimony of John Von Husen.)

Q. Will you tell the court what that page represents?

A. It records the acquisition of the Henning Tract [122] property by McDonald Island Farms in June of 1946, at \$125 per acre or a total of \$338,375.

Q. And what about the other figures?

A. The next entry is on December 21, 1946, covering a deed executed by McDonald Island Farms, Ltd. to Weyl-Zuckerman and Company, transferring mineral and gas rights on the Henning Tract property, which is a credit to this account.

Q. Now, there is a notation that was called to the attention of Mr. Zuckerman on cross-examination in the tax return, which, as I recall, involved the transfer of two-thirds of the surface rights of the McDonald Tract by the Weyl-Zuckerman and Company to McDonald Farms, Ltd. Do you recall that?

A. Yes, sir.

Q. Will you explain the circumstances under which that occurred?

A. It was about ten days or two weeks before the transfer of the surface rights on the McDonald Tract to McDonald Island Farms, Ltd. that Weyl-Zuckerman acquired from Zuckerman Potato Company their one-third interest in the surface rights of the McDonald Tract for which they paid cash at the time. There was no deed executed for this particular transfer as this property subsequently went to McDonald Island Farms, Ltd. and it was deeded directly by the [123] trustees of the Zuckerman Potato Company to McDonald Island Farms, Ltd.

(Testimony of John Von Husen.)

Q. Now, have you any records disclosing the trans—the details of these transactions insofar as purchase price and receipt of purchase price is concerned?

A. I know there is a ledger account which reflects the payment of——

Mr. Nyquist: Objection, your Honor, to any testimony as to what the contents of a ledger account——

Q. (By Mr. Livingston): Don't tell us what they contain, just tell us whether there are such ledger pages? A. Yes, sir.

Q. Are they in court here? A. No.

Q. Well, have you any records appertaining to the use of the funds—let's take, for example, the \$720,000 that was borrowed from the Bank of America. Have you any records here disclosing the disposition of those funds?

A. The \$720,000 which McDonald Island Farms obtained from the Bank of America was paid over to Weyl-Zuckerman and Company in payment for the Henning Tract of \$338,375 of the two-thirds of the surface rights which they acquired from Weyl-Zuckerman and Company for a total of approximately \$240,000 as well as for consideration for the improvements [124] and the equipment on Henning Tract, which accounted for these funds.

Q. Now, what was done with the payments received by Weyl-Zuckerman and Company from McDonald Island Farms, which you have just described?

(Testimony of John Von Husen.)

A. Well, Weyl-Zuckerman and Company repaid the Bank of America for the short term notes covering the acquisition of the McDonald stock from the Holly Sugar Corporation to the extent of \$216,620. It also paid for the mineral right acquired from the Holly Sugar Corporation, one hundred and eighteen thousand odd dollars. It retired the outstanding bonds on the Henning property of approximately 146,000 and it also retired some long term notes to E. M. Weyl for \$95,000 and to Helen Rosenfels for \$66,000.

Q. What was that last figure?

A. 66,000, approximately, \$66,000.

Q. What was done by the purchase price received from the Weyl-Zuckerman and Company from the Pacific Oil Company of \$609,000?

A. That money was——

Q. Well, pardon me. Let me interrupt here for just a moment. You said that—go ahead, thank you.

A. What?

Q. Withdraw the interruption.

A. All 609,000, there were notes paid to the Bank of [125] America which had become due on December 31, 1946, and which were overdue at the time. There were \$350,000 of such notes that Weyl-Zuckerman and Company owed to the bank and there was another hundred thousand dollars that Weyl-Zuckerman's subsidiary, the General Potato and Onion Distributors owed to the Bank of America, and there was \$150,000 owed by the Zuckerman

(Testimony of John Von Husen.)

Potato Company. That accounted for \$600,000 of that money.

Mr. Livingston: You may cross examine.

Cross Examination

Q. (By Mr. Nyquist): Getting back to this one-third interest in the McDonald surface rights which were held by Zuckerman Potato Company——

A. Yes.

Q. I wanted to be sure I understood your testimony on that. You say that a conveyance was made directly from Zuckerman Potato Company to McDonald Island Farms——

A. That is correct.

Q. ——Ltd.? A. That is correct.

Q. But it was taken in on the books of Weyl-Zuckerman and shown as a sale by Weyl-Zuckerman to—— A. That is correct.

Mr. Nyquist: I ask that this be marked for [126] identification.

The Clerk: Exhibit E for identification.

Mr. Nyquist: I show you Respondent's Exhibit E for identification and ask you if that is your signature at the bottom of that document?

A. Yes.

Q. Does this document consist—is this document a protest filed on behalf of Weyl-Zuckerman and Company with the Bureau of Internal Revenue in connection with this matter?

A. Yes, it is.

Mr. Nyquist: I offer this in evidence, your Honor.

(Testimony of John Von Husen.)

Mr. Livingston: No objection.

The Court: Be admitted.

The Clerk: Exhibit E.

(The protest above referred to was marked and received in evidence as Respondent's Exhibit No. E.)

Mr. Nyquist: No further questions, your Honor.

Mr. Livingston: That is Petitioner's case, your Honor.

(The deed referred to was marked and received in evidence as Petitioner's Exhibit No. 10.)

Mr. Nyquist: I have here a document which I would like to introduce as Respondent's next in order. I have submitted it to Mr. Livingston. You have a copy. It is merely [127] a computation of corporation income tax for the year 1946, assuming all items of gross income and deductions and credits, the same as on the Weyl-Zuckerman return, but excluding that amount of \$230 and making the corresponding adjustment to the different received credit. It is for showing the amount of additional tax they paid in '46 in order to get what the Government contends is that attempted tax saving.

I believe he will stipulate to the accuracy of the computation.

Mr. Livingston: I will stipulate to the accuracy of the computation but I don't consider it proper material for an exhibit.

The Court: The exhibit will be admitted.

The Clerk: Exhibit F.

(The computation referred to was marked and received in evidence as Respondent's Exhibit No. F.)

Mr. Nyquist: You have rested your case, Mr. Livingston?

Mr. Livingston: Yes.

Mr. Nyquist: Mr. Schroeder, will you take the stand, please?

Whereupon,

GEORGE SCHROEDER

was called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified [128] as follows:

Direct Examination

The Clerk: Will you have a seat, sir, and state your name and address, please?

The Witness: George Schroeder, Standard Oil Company of California, 225 Bush Street, San Francisco.

Q. (By Mr. Nyquist): Please state very briefly the general nature of the Standard Oil Company?

A. Well, it is in the business of producing and refining, distributing oil, gas and other hydrocarbon substances in California and other states.

Q. And are you acquainted with the Pacific Oil Company? A. Yes, I am.

Q. Will you explain its relationship to Standard Oil Company?

(Testimony of George Schroeder.)

A. It is a 100% subsidiary of Standard Oil of California.

Q. You stated you are also employed by Standard. Are you also employed by Pacific Oil?

A. I think you can say I am. It is a hundred per cent subsidiary and we do work for the subsidiaries as well as the parent corporation.

Q. You brought certain documents with you in response to a subpoena?

A. I have them here. [129]

Q. One of these documents is the original of the deed, a copy of which is already in evidence, one of Petitioner's exhibits. That is a deed dated November 18th, 1935—excuse me, dated January 20, 1947, and recorded January 23, 1947, from Weyl-Zuckerman to Pacific Oil Company. I am not sure of the number, but Petitioner has put a copy of this in evidence. I would like to put a copy, a photostatic copy of the original in evidence as Respondent's Exhibit next in order.

Mr. Livingston: No objection.

The Court: It will be admitted. I would like counsel to tell me why we need two copies of the same exhibit.

Mr. Nyquist: Well, the witness John Zuckerman was unable to recall whether the deed from McDonald Island Farms to Weyl-Zuckerman which was recorded on January 10th, 1947, or whether it was executed on the date that it bears, December 21, 1946.

(Testimony of George Schroeder.)

Mr. Livingston: I didn't quite follow that. Will you read that to me please?

Mr. Nyquist: I say the witness John Zuckerman was unable to recall when he was questioned, he said he was unable to recall or testify whether the deed from McDonald Island Farms to Weyl-Zuckerman, which bears the date of December 21, 1946, was recorded January 10th, 1947. He was unable to recall whether that deed was executed on the date that it bears or on [130] the date that it was filed and——

Mr. Livingston: Well, I don't see. Maybe I don't understand.

Mr. Nyquist: Can I finish my sentence? I will tell you what I am driving at. This deed, which was executed by the taxpayer, Exhibit G, contains in it a recital: "Whereas by deed, executed by McDonald on December 21, 1946 and recorded on January 10th, 1947 * * *" and so forth.

Now, that statement appears both in the copy I am introducing and the copy you are introducing, but the copy I am introducing, which is a copy of the original, shows that a date, January, 1947, was typed in and struck out and January 21, 1946, was substituted.

Mr. Livingston: The deed he speaks of was acknowledged on December 21, 1946.

The Court: What is the corresponding exhibit number of the other one?

The Clerk: Exhibit G.

(Testimony of George Schroeder.)

The Court: In other words, Exhibit G and Exhibit 5 purportedly relate to the same matter?

Mr. Nyquist: Exhibit G is a copy of the original deed in the possession of Standard Oil, Exhibit 5 is a copy of the records of the County Recorder. I believe that is correct, is it?

Mr. Livingston: I think so. [131]

The Court: In other words Exhibit 5 is a copy of a copy, whereas Exhibit G is the original—is a copy of the original?

Mr. Nyquist: Photostat of the original and the original is here in case anyone cares to inspect it.

The Court: I see. Thank you very much.

(The photostat referred to was marked and received in evidence as Respondent's Exhibit No. G.)

Q. (By Mr. Nyquist): Mr. Schroeder, will you describe the situation that existed, or the business relationship that existed between Weyl-Zuckerman and this Standard Oil Company at the beginning of 1946? A. The business relationship?

Q. Yes.

A. Well, we were—Standard Oil Company of California was the lessee of—

Q. Let me interrupt a moment. I am not sure that is clear in the record just what the nature of your employment with Standard Oil Company is. I think that should be clarified first.

A. I am manager of the contract division of the producing department of Standard Oil Company of California and a part of my work in the company

(Testimony of George Schroeder.)

through the years has been the administration of contracts and negotiation of leases and [132] purchase of properties that are involved on and in gas lands.

Q. Did you do the negotiating with respect to the dealings with these—with the Weyl-Zuckerman Company?

A. I did the negotiating; yes, sir.

Q. What was the business relationship that existed at the beginning of 1946?

A. At the beginning of 1946, the Standard Oil Company of California was the—was the lessee of Weyl-Zuckerman and the McDonald Island Farms. I have here some papers; I would like to look at these papers to get those correct names of the corporations if that is of significance. One was Weyl-Zuckerman and Company and the other one—well, I guess you know what it is, it is McDonald Island Farms Company, I guess it is.

Q. I think I can speed this up a little by a leading question. There has been testimony on direct examination—rather there has been testimony earlier in this case about some friction between Standard Oil Company and Weyl-Zuckerman and around that date, and I am wondering if you would explain the nature of that friction?

A. Well, I have these memos here with these dates and—are the dates significant here?

Q. Yes, the dates are significant.

A. Or do you want me to just state——

Q. The dates are significant. [133]

(Testimony of George Schroeder.)

A. Well, from these memos——

Q. If you need to look to refresh your recollection, yes.

A. Well, this is a memo, memorandum dated December the 13th, 1946.

Q. Pardon me. A. Yes.

Mr. Nyquist: Let me mark these memoranda for identification at this time.

You have a photostat of each of these, I believe, and I won't have to take your originals.

I will ask you to mark as exhibits next in order for identification, these four documents. Do you want to see these?

Mr. Livingston: As long as they are only for identification——

The Clerk: Exhibits H, I, J and K for identification.

(The documents above referred to were marked for identification as Respondent's Exhibits Nos. H, I, J and K.)

Q. (By Mr. Nyquist): I ask you, Mr. Schroeder, were these memoranda made by you in the course of your business at about the time of the transactions between yourself and—between Standard Oil Company and Weyl-Zuckerman? [134]

A. They were.

Q. And at the time did you know the statements contained therein to be correct?

A. Oh, yes.

Mr. Nyquist: I shall offer these in evidence as Respondent's next in order.

(Testimony of George Schroeder.)

Mr. Livingston: Well, I must object, your Honor. In the first place on their face they demonstrate they are not contemporaneous memoranda. In the second place, it is not permissible to offer in evidence memoranda of any kind. The proper procedure is that if there is contemporaneous memoranda, as the witness needs by such contemporaneous memoranda to refresh his recollection, he may use that memoranda for the purpose of so doing it, but the memoranda itself is not in evidence, but there are two objections to the offer counsel has made.

Mr. Nyquist: He has testified that these are memoranda made in the regular course of his business at the time.

Mr. Livingston: I don't think so.

Mr. Nyquist: And for that reason I have offered them. However, I will take—it will take a little longer to go through them with the witness. I will be glad to go at them that way if it is desirable.

Mr. Livingston: May I ask the witness a question [135] on voir dire?

Voir Dire Examination

Q. (By Mr. Livingston): Mr. Schroeder, this memoranda was prepared on December 13th, 1946, was it not? A. Yes, sir.

Q. And it purports—

The Court: You are referring to one of these memoranda, Exhibit H, for identification?

Mr. Livingston: The one that is headed December 13th, 1946, San Francisco, December 13, 1946.

(Testimony of George Schroeder.)

Q. (By Mr. Livingston): That was prepared on the date that appears there? A. Yes.

Q. And this memoranda was not prepared at or about the time of this conversation that is related in the memorandum which occurred in November, 1945, it was prepared some year and thirteen months afterwards, is that correct?

A. That is correct.

Direct Examination—(Resumed)

Q. (By Mr. Nyquist): At the time you prepared the memorandum did you know the facts stated therein to be true?

A. Yes, I believe everything stated here is a true statement. I made it with that intention. [136]

Mr. Nyquist: If your Honor desires, I will take this witness through the things one at a time.

The Court: I am going to adjourn at this time.

We will reconvene at 10:00 o'clock tomorrow morning.

(Whereupon, at 4:35 p.m. a recess was taken until 10:00 o'clock a.m., Thursday, March 18, 1954.) [137]

The Clerk: Docket No. 43,504, Weyl-Zuckerman and Company.

Mr. Nyquist: Any questions, your Honor? I will ask Mr. Schroeder to take the stand again.

Whereupon, George Schroeder resumed his testimony as follows:

Mr. Livingston: In line with your discussion of yesterday afternoon, if the Court please, I am will-

(Testimony of George Schroeder.)

ing that Mr. Schroeder may use this memorandum of December 13, 1946, but I think it is necessary that an obvious stenographic error——

The Court: I don't know what you mean. You said "is using it." What do you mean by "using it"?

Mr. Livingston: Well, he may have it before him and testify from it. It is my impression that Mr. Nyquist desires to follow that course. If I am in error then I will not press the proposal.

Mr. Nyquist: Your Honor, I believe Mr. Schroeder probably can testify from recollection on most of this but, if necessary, we will ask him to refresh his recollection from the documents.

The Court: He may do so.

Mr. Nyquist: All right. [139]

Q. (By Mr. Nyquist): Mr. Schroeder, will you——

Mr. Livingston: My suggestion is withdrawn. Mr. Nyquist will proceed on his own matter.

Q. (By Mr. Nyquist): Mr. Schroeder, will you explain the business relationship that existed between the Standard Oil Company, Weyl-Zuckerman and Company, and McDonald Island Farms, Ltd. in the latter part of 1945 and the early part of 1946, briefly?

A. The Standard Oil Company had leases that were—that we were the lessee and these companies you name, McDonald Island Farms and Weyl-Zuckerman and Company were the lessors. The lands covered by the leases were over in what we call the McDonald Island gas field and the mainte-

(Testimony of George Schroeder.)

nance of that lessor-lessee relation is something that more or less fell to me. There were times when the landowners would come in and make inquiry, ask—complain about this or that, particularly the amount of royalty that was allocated to these pieces of property as compared to the amount allocated to other properties in the field and we used to confer quite a bit about that in an effort to see that the correct amount of gas produced from the different properties was the fair and equitable share of each of the lessors.

Q. Well, how would you describe the relationship that existed with respect to these particular lessors, that is, in [140] the sense of whether it was a smooth running relationship or whether there was friction?

A. Well, we had many complaints from the Zuckermans.

Q. Will you tell us, with as great a degree of precision as you can, as to dates, the course of the early offers to buy or to sell with respect to the gas rights that were ultimately conveyed to the Standard Oil Company subsidiary in the early part of 1947?

Mr. Livingston: Objection. The question is too general. The proper course is to interrogate the witness as to a specific conversation.

Mr. Nyquist: Well, I will be very glad to tell the witness the specific dates and places of the conversation, if it is satisfactory to Mr. Livingston. I was trying not to lead the witness, your Honor.

(Testimony of George Schroeder.)

Mr. Livingston: Thank you.

Q. (By Mr. Nyquist): Was there a conversation in November, 1945, with respect to a possible sale to Standard Oil Company of gas rights on McDonald Island?

A. Yes, sir.

Q. Can you tell us the general—can you tell us what was said on——

A. Oh, I don't think so. I don't remember particularly who said what and how and when, but I did make this note here [141] and I do know that I offered the Zuckermans 500,000 for those—for their interest in those leases. Now, whether this could have covered just the gas rights initially, whether we were talking about all of the rights including surface and all those things like that, I couldn't tell you, but I did make this note and I do know that I had the conversation as I indicated in this memorandum and he did offer them \$500,000.

Q. Was that offer accepted? A. It was not.

Q. What was the next step in the negotiations early in July of nineteen forty——

Mr. Livingston: Objection. Calls for the conclusion of the witness. Proper question is to inquire concerning a specific conversation.

Q. (By Mr. Nyquist): Were there further negotiations in July of 1946?

Mr. Livingston: Objection. Proper question should be: was there——

The Court: The witness may answer.

A. Will you ask that again, please?

(Testimony of George Schroeder.)

Q. (By Mr. Nyquist): Were there further negotiations in July of 1946? A. Yes.

Q. Will you tell us about those negotiations?

A. At that time Maurice Zuckerman called at the office and offered to sell these properties and again I can't be specific as to whether it included this or that or what, but generally the gas rights in there which were the subject of our concern.

The Court: By "the gas rights" do you mean the gas rights underlying the entire island?

The Witness: Yes, sir. He offered that for \$875,000 but before the meeting was over he indicated to me that if we would go along that he would be willing to cut that down to \$820,000. I had the feeling that he wanted us to kind of nominate a figure there of that order.

Q. (By Mr. Nyquist): Was John Zuckerman present at that conference?

A. I do not remember.

Q. You have no present recollection of whether John Zuckerman was present at that conference?

A. I don't recall that he was there. I don't believe—I would have to say I don't believe he was there; I don't remember that he was there.

Q. Could your recollection on that matter be refreshed by looking at the second paragraph of your memorandum of December 13th, 1946?

A. At that time John Zuckerman suggested that they would—is that the paragraph you mean?

Q. Yes. [143]

A. Well, that did not have to do with the dis-

(Testimony of George Schroeder.)

discussion in July. That had to do with the discussion in August.

Q. Oh, I see. I misunderstood. All right, was there a further discussion in August of 1946?

A. Yes, sir.

Q. Will you tell us the nature of that discussion?

A. At that time I—that was following discussions with our own people after the thing had been pushed around by our own group, and I told John Zuckerman at that time that we would not go for their proposal because it was he who indicated that—at the time—that they would probably then get ready to sue because of some of these differences of opinion that we had in respect to the allocation of production to these properties and the matter of drilling additional wells and things of that sort in connection with the administration of the lease.

Q. Did this statement by Mr. Zuckerman that he would probably get ready to sue have any effect upon your attitude toward further negotiations for the purchase of these gas rights?

Mr. Livingston: Objection. Calls for the conclusion of the witness.

Mr. Nyquist: Your Honor, I am making inquiry here as to his motives and attitude and how this particular fact affected his outlook on the transaction. This is exactly the [144] same thing that we were covering all day yesterday in Mr. John Zuckerman's direct testimony.

Mr. Livingston: I don't think so. I don't think the business purposes of the Weyl-Zuckerman Com-

(Testimony of George Schroeder.)

pany can be determined by the attitude of mind on the part of Standard Oil Company nor upon the part of this witness.

Mr. Nyquist: I might say the purpose, your Honor, is simply to show that the ultimate purchase was due to a certain extent, to a desire to eliminate a possible law suit. That is, the threat to sue was a factor in the negotiations.

The Court: Well, I don't see there is any real difference between the parties on that. It seems to me that exactly was what Mr. Livingston was trying to establish through Mr. Zuckerman's testimony yesterday. What is the quibbling between you about?

Mr. Livingston: I don't put it in the same way, that is all. The implications that I find in the testimony are that no one knuckled down to the other because of a prospective law suit. On the contrary, that law suit was, in preparation and that by means of a sale they avoided it. Standard Oil Company, I don't think, was afraid of Weyl-Zuckerman's law suits. I may be wrong, but I don't think it makes any difference. I think it is immaterial whether they were afraid or not. The facts are there and it is for the court to determine the consequences of the fact.

The Court: Gentlemen, the difference between you escapes me.

Mr. Livingston: It may be. However, the difference, if it does exist, in my own mind, it may be utterly immaterial so therefore I don't think the question is proper.

(Testimony of George Schroeder.)

The Court: If it is immaterial it will go to the weight. However, out of an abundance of caution I will allow the witness to answer.

Will you read it back, Mr. Reporter?

(The question was read by the reporter.)

A. Well, I don't recall that it had any effect upon my attitude, if you mean mine. I don't recall that it had any effect upon mine.

Q. (By Mr. Nyquist): Was it an element that was considered and given some consideration in determining whether the ultimate purchase should be made?

Mr. Livingston: Same objection, and further objection that counsel is cross examining his own witness.

The Witness: Will you——

The Court: The witness may answer.

The Witness: Will you read it back again, please? I am sorry.

(The question was read by the reporter.)

A. Yes, sir. [146]

Q. (By Mr. Nyquist): Will you explain that statement?

Mr. Livingston: Same objection; calls for the conclusion and explanations not proper on direct examination.

The Court: The witness may answer.

The Witness: Would you read it to me, please?

(The question was read by the reporter.)

A. All during these negotiations we were concerned with the administration of this rather com-

(Testimony of George Schroeder.)

plicated, so-called, rateable taking plan matter of apportioning the gas company's demand for deliveries between the various properties in the McDonald Island gas field that we were operating under lease and when one landowner comes in and complains about his share and wants it to be increased, we are naturally concerned with it. We still want to be able to apportion the entire production properly between all of the properties, and there was also the matter of the drilling of a well in there, and I believe after one time we indicated that we might probably drill that extra well, and yet those things always bothered us. They were always there, and they had some bearing, maybe, in coming up with the final dollars that we ultimately agreed to pay for this thing. It was part of the whole picture.

The Court: Well, of course, Mr. Nyquist, what may have been the secret understanding or secret intentions of Standard Oil or its subsidiaries can have no bearing upon the [147] outcome of this case and to that extent Mr. Livingston's objections—he is right in his objections and I am not going to give any weight to any undisclosed intentions of Standard or its subsidiaries in this matter. The important thing, it seems to me in connection with this case, is to what extent Standard's thoughts, negotiations, and similar matters were made known to the Petitioner or its representatives or might have been ascertainable or discerned by such representatives and, to that extent, this testimony may

(Testimony of George Schroeder.)

be relevant but it is relevant only to the extent that, the purpose of Standard was either explicitly made known to Zuckerman or its representatives or to the extent that it was reasonably inferred that it was readily ascertainable by them.

Mr. Nyquist: It was merely introduced in showing it had some effect in facilitating a sale here. I don't expect I can get Petitioner to say it was intended for that purpose, but I merely want to show it had that effect.

The Court: I just want the record to be clear that I am admitting his testimony for only the limited purpose.

Q. (By Mr. Nyquist): Mr. Schroeder, was there a further conversation on December 12th, 1946, with respect to the McDonald Island gas rights?

A. Yes, sir.

Q. Will you tell us the substance of that conversation? [148]

A. On that day Mr. John Zuckerman came into the office and indicated that they did not like to sue and that they would like to get back into the picture again on the basis of the sale of their interest and we mentioned the \$500,000. I think John Zuckerman mentioned that as being too low and mentioned it ought to be 30% more, namely \$650,000, and I believe I indicated that because of the payment of royalty between December 1st, 1945, and the date of that conversation, practically most of that year, that whatever the value should have been on the thing it would have to be reduced by the

(Testimony of George Schroeder.)

value of the production taken out in the interim and the net result of that was that John Zuckerman indicated willingness to sell the McDonald Island interest. According to my memorandum—I don't remember this in the discussion with John—but according to the memorandum that I wrote at that time he indicated that there would be willingness on their part to sell the McDonald interest right then at that time in December, 1946, for its proportionate share of this \$650,000 minus royalty and that we could have an option to buy the Weyl-Zuckerman parcel at some subsequent time for the same—for a proper apportionment of the same amount of dollars and those conversations, with respect to the sale of those interests, had to do with the gas rights and a certain reservation in the Zuckermans with respect to one-eighth oil royalty and I believe, initially at that time, [149] one-eighth gas royalty in certain zones that were not then being produced or certain portions of the property that were not then being produced.

Q. Mr. Schroeder, leaving now the subject of the negotiations with respect to sales price and turning to the matter of form of the ultimate conveyances, was there a conference on or about December 23rd, 1946, in this connection? A. Yes, sir.

Q. Were any documents produced at that conference? A. Yes, sir.

Q. Could you tell us what those documents were?

A. I don't recall them particularly, but they were documents.

(Testimony of George Schroeder.)

Mr. Livingston: Pardon me just a moment. I believe the witness is now referring to something in writing and I object on the ground that this form of testimony is not admissible. The writing is the best evidence.

Mr. Nyquist: You said—well, I will, then, offer the writing in evidence if it is agreeable with Mr. Livingston.

The Court: You object to the writing itself being offered?

Mr. Livingston: No, no. I haven't seen it yet. I don't know what particular writing they have in mind. (Mr. Nyquist handed Mr. Livingston a document.) That is not a writing. Counsel submits to me a memorandum. [150]

Mr. Nyquist: That is the——

Mr. Livingston: May I complete my statement? That is a memorandum dated September 24th, 1946, which is signed by the witness. As I understand the question, it asks the witness to tell him, or rather, to state to the court the contents of a document that existed on December 23rd, 1946.

Mr. Nyquist: Your Honor, I merely asked for a description of what documents were prepared. I did not request the contents of any documents.

Mr. Livingston: I misunderstood the question.

Mr. Nyquist: At least I so intend the question. I will withdraw the question and rephrase it.

Q. (By Mr. Nyquist): Were any drafts of deeds prepared and submitted at that conference?

A. It is my recollection that I went over there

(Testimony of George Schroeder.)

with Mr. Capocelli of Pillsbury, Madison, and Sutro and that we presented it to Mr. Livingston and Mr. Maurice Zuckerman and Mr. John Zuckerman our ideas of how papers might be drawn to cover the grant from the land owners to the Pacific Oil Company.

Q. Was one of those a draft of deed with respect to the Henning property?

Mr. Livingston: I object. I object on the ground [151] the deed is the best evidence of what it was. The question is improper on that ground.

Mr. Nyquist: Your Honor, I am not asking for the contents of the document. I am merely describing the document: was there a deed with respect to the Henning Tract?

Mr. Livingston: It tells us what was in it. I think that is the danger of asking for oral testimony as to the content of the document because the witness, his recollection may be at fault, his interpretation of the document may be erroneous. There is a historic rule—a historic basis for that rule.

The Court: In my judgment, Mr. Livingston, you are now engaging in obstructive tactics.

Mr. Livingston: Your Honor, please—go ahead. Now, I think——

The Court: There was property involved here that was in the hands of two different corporations——

Mr. Livingston: I think your Honor is—pardon me.

The Court: ——and this is a substance versus

(Testimony of George Schroeder.)

form case and the question ultimately to be decided is whether what appeared to be the facts are the true facts. Now, we have a transaction that was ultimately consummated in one matter. There is being presented testimony as to the nature [152] of that transaction before its ultimate consummation in an intermediate stage. I think the witness is competent to testify as to what form the transaction was to take or what form it was proposed to take prior to the conversion of that form into some different form that was ultimately used.

Mr. Livingston: Your Honor, I——

The Court: I remind you again, Mr. Livingston, as I think I did informally earlier in the trial, perhaps it was at a discussion at the bench, that rule 31 of the Rules of this Court contemplate that the parties will stipulate facts that are not fairly in dispute and it seems to me that the facts that relate to the prior documents that are here under discussion should be facts that should not be in dispute at all between the parties, and it seems to me that what you are doing is merely making it difficult to establish matters with respect to which there should be no dispute whatever between you.

I am going to call a recess at this point and I am going to ask counsel to get together with each other and see if they can't undertake to establish an agreement between themselves as to what those prior documents were.

Mr. Livingston: Before the recess, may I say something for the record?

(Testimony of George Schroeder.)

In the first place, I wish to call attention to the fact that if I had prepared in ample time a stipulation of [153] facts it would not have been accepted by Mr. Nyquist and the demonstration of that is that the stipulation of facts which I submitted to him last Monday was rejected substantially and the only stipulation that he was willing to give me is one consisting of approximately two pages, as I recall. I think that demonstrates that if there was any delay on my part in that respect it was delay without any consequence. It would have been an idle act for me to have asked him to stipulate to a lot more things and it was only the insistence on the part of your Honor that the parties get together that enabled us to get the stipulation prepared during the recess, as far as it went.

The Court: I was calling your attention to the rules of the court, and Rule 31 of this court contemplates that the parties will agree upon facts that are not fairly in dispute between them and I am now going to call a recess and I am going to call upon the counsel to get together with each other to attempt to establish and present to the court the facts in relation to these—to this transaction as it was originally formulated, a matter of which should not be in dispute at all between them.

Mr. Livingston: Yes, but my difficulty, if I may complete my statement, your Honor, is this:

Your Honor has the idea in your mind that I am engaging in obstructive tactics. You have given me no opportunity to [154] justify my position. As it

(Testimony of George Schroeder.)

now stands, your Honor has this viewpoint which, of course, must react, at least unfavorably toward me as a member before this bar, and I stand virtually convicted without having an opportunity to present my defense. That, whether or not that attitude of mind would be translated to the merits of this case, who can tell?

The Court: Well, I have no intention whatever of suggesting anything of that sort, Mr. Livingston.

Mr. Livingston: All right, let's assume, your Honor can divorce Livingston from Zuckerman or Weyl, at least my reputation is of sufficient value to me in this community so that when a judge undertakes to charge me with obstructive tactics I should have a chance to prove I am not guilty of the charge. After 45 years of practice in San Francisco such little reputation as I have been able to attain in the community should not be shattered.

The Court: Well, there was no intention to make any such suggestion as that, Mr. Livingston. It was the course that the trial was taking this morning that was making it extremely difficult to establish facts which really should not have been in dispute at all between the parties——

Mr. Livingston: But my—pardon me.

The Court: ——and I suggest that an effort be made to arrive at——

Mr. Nyquist: Your Honor—— [155]

The Court: ——an agreement between the parties as to those facts.

Mr. Livingston: I assure you—Pardon me.

(Testimony of George Schroeder.)

The Court: I think you are undoubtedly magnifying the remark I made far beyond its import, and I assure you there was no intention at all to reflect upon you.

Mr. Livingston: I am delighted to hear that——

Mr. Nyquist: Your Honor——

Mr. Livingston: May I finish, please? I have one more thing I want to say. I say, I am delighted to hear that because ordinarily that is regarded as unethical practice in this community, and any lawyer who seeks to practice on an ethical plane will not do that.

Now, as far as agreeing, if counsel had said to me, "I would like to have the identity of these documents that were presented at this meeting of December 23rd, 1946, established," all he had to do was show them to me. My point is, how can we ask a witness on the stand to tell us about what document, what it looked like, what it contained, when the transaction of the incident that he undertakes to relate occurred some seven years ago?

The Court: Well, the essence of counsel's questions did not go, as I understand them, to the minutiae of these documents. A document can be described as a deed from A to B without getting into the details of the document, and I [156] gathered that was the sole import of these questions as to whether or not there were two deeds, one running from one grantor and another running from the second grantor, both to a common grantee, without getting into the details of the document at all.

(Testimony of George Schroeder.)

Now, I take it that was the sole import of the Government's questions. Is that right, Mr. Nyquist?

Mr. Nyquist: That is right, your Honor.

The Court: Now, can't the parties agree on that?

Mr. Livingston: I can't agree without seeing the documents, that is obvious. Apparently Mr. Nyquist, if it is a fact as your Honor suggests, that there were in existence at that time or submitted——

The Court: I don't know the facts at all. I am suggesting only that these are facts that should be known to both parties and if they are known to both parties they are facts that are not fairly in dispute. That is all I am saying.

Mr. Livingston: Well, I certainly cannot say at this time that I know the answer to that question because my recollection, although I sat in on these conferences, my memory is not so well developed that I can say what papers I saw at that time.

I know, because we have introduced them in evidence, the papers that were eventually signed. Now, if, as Mr. Nyquist suggests, there is an importance to be attached if this [157] were two deeds signed at that time we shouldn't depend on Mr. Schroeder's recollection as to whether there were two deeds or not. I think it is proper to have the papers here. That is all.

It may not be of any consequence, but if it is, I should not be placed in the position of having my case prejudiced by a possible failure of memory or misapprehension on the part of Mr. Schroeder concerning a seven-year old transaction. So, I would be

(Testimony of George Schroeder.)

glad to take advantage of the recess and see if we can find out what the documents were.

Mr. Nyquist: Your Honor, it is quite possible I could bring out the same point by a slightly different question without reference to the documents, and I will have a try at it if it will expedite things, but I do wish to say that Mr. Livingston made certain statements concerning the conduct of the Government counsel and the stipulation of facts, and I therefore would like to state, for the record, that on January 20th, 1954, the Regional Counsel's Office wrote to Mr. Livingston calling his attention to the Court's rule requiring a stipulation of facts and suggesting that such a stipulation be prepared and forwarded to the Government some time in March—in February—so that the Government would have a chance to check the facts and stipulate. I wish to state that I did not hear from Mr. Livingston until after I had served subpoenas on the petitioner and [158] McDonald Island Farms on the Thursday before the call of the calendar, and that I did not receive Mr. Livingston's draft of the proposed stipulation until after the call of the calendar on Monday of this week.

Now, I wish to state that at that time, even in the presence of other calendar business, I prepared a revised draft containing most of the material Mr. Livingston suggested and returned it to him within twenty-four hours of the time I received his draft, and the only reply I had from Mr. Livingston on that matter was that he would probably stipulate

(Testimony of George Schroeder.)

in open Court. He hadn't agreed with the revised draft of the stipulation.

Mr. Livingston: Now, it is quite evident that counsel is endeavoring to exploit, for the benefit of his side of the case, a subject which has been—which was discussed yesterday morning, and has been rediscussed today.

Mr. Nyquist: I am merely attempting to correct the record of Mr. Livingston's statement to the effect that Government counsel was uncooperative in attempting to stipulate.

Mr. Livingston: I say, and I challenge counsel to produce, the paper that he prepared, which will show what a limited scope it was.

The Court: Gentlemen, I think we have had enough of these mutual challenges, and let's get on with the trial of the case if we can. [159]

If Government's counsel believes he can obtain the evidence from this witness in a manner which will not involve the use of the contents of the documents under discussion, I will permit him to make the effort subject, of course, to any objections that may be made.

Q. (By Mr. Nyquist): Mr. Schroeder, at the conference of December 23rd, 1946, did you or other representatives of your company make any proposals with respect to the manner in which the rights in the Henning Tract were to be transferred from the then owners to the purchaser?

A. Yes, sir.

Q. What was your suggestion?

(Testimony of George Schroeder.)

A. Mr. Capocelli and I went over there to the office. I believe it was Mr. Livingston's office, at which time Mr. John Zuckerman and Mr. Maurice Zuckerman were present, and we presented our suggested form of deed to cover the—or document to cover the transfer to the Pacific Oil Company of the rights that John Zuckerman and I had agreed upon were to be transferred.

In other words, John and I—John Zuckerman and I had practically reached an understanding as to what the deal was, and we had to put it in writing in order to transfer the property interests. Somebody had to start it, and we submitted some papers to cover, I believe, both of the properties.

Q. My specific question was: What was your suggestion as to the manner of conveying the Henning Tract from its then owner, McDonald Island Farms, to the purchaser? That is, the route that the conveyance was to take, was it to be a direct conveyance or indirectly through some other corporation?

Mr. Livingston: I object to that on the ground it assumes something not in evidence, if I understood the question. He is asking the witness about a proposal with respect to the transfer of the rights under Henning Tract to be made by McDonald Island Farms, and the evidence shows that there was a deed dated December 21, 1946, in which those rights were transferred by McDonald Island Farms to Weyl-Zuckerman and Company pursuant to a dividend that was declared in kind on the same date.

(Testimony of George Schroeder.)

Mr. Nyquist: Your Honor, there was a deed dated December 21, recorded January 10th, 1947, and we are talking about a conference of December 23rd, 1946.

Mr. Livingston: But, under the law of California recordation has nothing to do with transfer of title. That is merely the manner that the transaction is presented to protect the purchasers for value.

The Court: Let's get this straight right here and now. At the time of that conference, December 23rd, 1946, had the deeds been executed either to Standard or to a nominee of Standard? [161]

The Witness: You are asking me that, sir?

The Court: Yes.

The Witness: I am sure there were no deeds executed to the Standard Oil Company on that day.

Q. (By Mr. Livingston): Or Pacific Oil?

A. Or the Pacific Oil upon that day.

The Court: Namely, that the transaction had not yet been consummated on December the 23rd?

The Witness: That is correct, sir.

The Court: In fact, the conversations on December 23rd, 1946, were conversations looking forward to the consummation of the transfer of title, were they not?

The Witness: Yes, sir. As I say, John Zuckerman and I had an understanding of what the basic deal was, and the purpose of the meeting was to get the papers to transfer.

Mr. Livingston: I believe the documents are dated January 11th, 1947, your Honor. I may be

(Testimony of George Schroeder.)

in error as to the date, but I think that is approximately——

The Court: Well, there is discussion about deeds dated December 21.

Mr. Livingston: That was a deed that was executed pursuant to the dividend which is under attack here, the dividend of the mineral rights.

Is that clear, or am I still confusing the Court?

The Court: I think I have your point. Thank you.

Mr. Nyquist: I will withdraw my previous question and ask you:

Q. (By Mr. Nyquist): At the time you went into this conference on December 23rd, 1946, whether you knew at that time that there had been a conveyance of the Henning Tract from McDonald Island Farms, Ltd. to Weyl-Zuckerman Incorporated?

A. I do not recall, sir, any knowledge of that at that time. We were talking with John Zuckerman, Maurice Zuckerman about buying the properties, the two properties, and I don't remember that we ever discussed who had it or how it stood or anything like that.

When I talked to John Zuckerman over the years about these properties we were talking about the properties, unless he would happen to mention the Henning Tract or the other one.

Q. My question specifically was, on December 23rd when you went into that conference, had you any knowledge in advance of that time that there

(Testimony of George Schroeder.)

had been this conveyance dated December 21st from McDonald Island Farms to Weyl-Zuckerman?

A. I don't recall any discussion——

The Court: Well, was it of any consequence to Standard at all what route these conveyances were to take, as long as Standard or its subsidiary would be the ultimate grantee? [163]

The Witness: It made no difference. We weren't too concerned.

The Court: It was a matter of no consequence to you?

The Witness: That is correct.

Q. (By Mr. Nyquist): At the time you went in to that conference of December 23rd, what was your intention, that there be a conveyance directly from McDonald Island Farms to Pacific Oil Company?

Mr. Livingston: May I have that question, please?

(Question read by the Reporter.)

Mr. Livingston: I can't see that is material, your Honor, and it calls for his conclusion, conclusion on the part of a third party.

Mr. Nyquist: Your Honor, the materiality is this: I am trying to show that this December 23rd conference, which is after the date of the conveyance from McDonald Island Farms, after the date the conveyance bears, but before it was recorded, the parties were still talking; that is, the Standard Oil went in to the conference on the assumption that they could get a—that there would be a direct conveyance from McDonald Island Farms to Pacific Oil,

(Testimony of George Schroeder.)

that Standard intended that the deal be that way, that it was Mr. Livingston's suggestion that the deal be put in the round-about form, and I also——

The Court: I don't think there has been any [164] testimony that Mr. Livingston made such suggestions.

Mr. Nyquist: Well, I want to first get in the fact that at this time they had not been apprized of any December 21st conveyance and the negotiations were still open at that time as to how the conveyances were to be made.

Mr. Livingston: But the witness testified a moment ago in answer to your Honor's question, as far as he was concerned, he didn't care what route the transaction took. All he wanted was to get the gas rights.

Mr. Nyquist: All right. At the time—I will withdraw my previous question.

Q. (By Mr. Nyquist): At the time you—At the December 23rd conference in 1946, did you make a—did you or Standard Oil Company make a suggestion or present a plan as to the route which the conveyance of the gas rights underlying the Henning Tract should take in being transferred to Standard Oil or to Pacific Oil?

A. I don't recall any distinction between the Henning Tract or the other parcel. These papers that we presented were designed—it was our suggestion of a way to consummate the deal so that we would get both of these properties.

The Court: Well, was it your understanding

(Testimony of George Schroeder.)

when you went into that conference of December the 23rd, that one of these tracts was owned by Weyl-Zuckerman and that the [165] other tract was owned by McDonald and whether you rightly or wrongly so understood, you nevertheless were proceeding on that basis and had drafted papers to effectuate a transfer of these respective tracts from each of the purported owners to Pacific Oil?

The Witness: I'm afraid that I don't remember with that amount of precision. I know that what we were trying to do was to acquire the two properties and I felt satisfied that the documents that we presented were grants that would have given to the Pacific Oil Company things that we wanted. I mean, that is what we submitted as a form to Mr. Livingston, and, as I remember, he didn't like that approach and we proceeded then to talk about putting certain modifications in the leases.

As I remember, the papers were a grant with certain reservations and you wanted to go a slightly different route, you wanted to submit your own papers. You threw out, in effect, the papers that we had suggested, and I couldn't tell you the name of the grantor, the grantee. I wasn't particularly interested in the—in that aspect of it. We wanted to buy these two properties, and that was the understanding that John Zuckerman and I had reached. We wanted those documents to come to us, and we suggested one form and Mr. Livingston suggested another form.

The Court: When you use the word "you" in

(Testimony of George Schroeder.)

your [166] testimony, you are referring to Mr. Livingston?

The Witness: Yes, I believe that is right.

Q. (By Mr. Nyquist): You have just—Excuse me. In your previous statement you said that you had prepared the documents in one form and Mr. Livingston in another form. Can you explain what differences there were—Well, that perhaps is subject to Mr. Livingston's objection. I will withdraw it.

Did Standard Oil or you ever indicate or state to the taxpayer or to any of the taxpayers' representatives that you preferred—that it made any difference to you whether you received title for the property from two transferors or from a single transferor?

A. I do not recall any such thing as that.

Q. Was there a further conference early in January of 1947 with respect to the form in which these conveyances were to be made?

A. As I remember, sir, we had more or less continuous discussions there for a couple of weeks between—around the Christmas holidays, between the time that these papers were first submitted by us and the time the transaction was consummated.

There were several little points that had to be cleared up. I remember we had some debate as to the location of the line cutting off a portion of the Henning Tract to the [167] southwest that was to be—with respect to which the Weyl-Zuckerman people were to keep the gas rights subject to the lease

(Testimony of George Schroeder.)

of the Standard Oil Company and discussion on the location of the contact point between the Eocene and cretaceous so that Zuckermans would have the gas royalty. I don't remember particularly what point was discussed on what day, but we had discussions.

Q. Mr. Schroeder, on January 8th, 1947, did Mr. Livingston, acting as representative for the taxpayers Weyl-Zuckerman, hand to you certain documents?

A. I do not recall the day on which Mr. Livingston gave me the documents.

Q. Did you write a memorandum on January 8th, 1947, in which you set forth the facts as you then knew them?

A. A memorandum dated January 8th—

Q. Just answer yes or no. Did you write a memorandum dated on that date?

A. I did not.

Q. Did you prepare—

A. I did not.

Q. What?

A. I did not.

Q. Did you—Did someone under your supervision write such a memorandum?

A. Yes, sir. [168]

Q. And did you read it at the time?

A. I believe I did, yes.

Q. And did you know it to be correct at the time?

A. I believe it is correct. I believe it to be correct.

(Testimony of George Schroeder.)

Q. Would looking at that memorandum refresh your recollection in this matter?

A. Yes, sir.

Q. All right, I will then ask you to look at the last half of the memorandum dated January 8th, 1947.

A. Where it reads, "We all"—

Q. Yes, just look at it and go through it. Read it to yourself.

A. I have read it.

Q. Having read that, is your recollection refreshed in this matter?

A. I suppose so.

Q. I again ask you, on January 8th, 1947, did Mr. Livingston, acting as representative for the sellers, hand to you, as a representative of the buyer, certain documents?

A. My memorandum states—Our memorandum states that he handed them to me on that day, so I believe that he handed them to me on that day.

Q. But you have no present recollection?

A. No, sir. All during those periods, during that period of negotiations, what happened on the particular day [169] I am afraid I don't remember, sir.

Mr. Nyquist: Your Honor, in view of the fact that this witness has no present recollection on this matter, but this memorandum was prepared for his signature and by an employee under his direction and he knew at the time that the contents were accurate, I offer that memorandum in evidence. The memorandum which has been marked for identification, Respondent's Exhibit J for identification.

Mr. Livingston: I am not objecting.

(Testimony of George Schroeder.)

The Court: It may be admitted.

The Clerk: Exhibit J is admitted.

(The memorandum referred to, heretofore marked as Respondent's Exhibit J, for identification, was received in evidence.)

Mr. Livingston: I presume that counsel, in interrogating the witness, will call his attention to the second half of the memorandum. I don't suppose that the interrogation limits the introduction of the document to the second half, that was so identified. The entire document was in?

The Court: I didn't understand there was any limitation on that, Mr. Livingston, and your consent to its admission, I take it, was to the entire document?

Mr. Livingston: That is right.

Mr. Nyquist: So that the record may be clear on this one final point: [170]

Q. (By Mr. Nyquist): Mr. Schroeder, at whose suggestion were the conveyances put in their final form whereby the Henning Tract was conveyed first to Weyl-Zuckerman and then to Pacific Oil as distinguished from a direct conveyance?

Mr. Livingston: Well, if your Honor please, may I understand that question? Does he ask Mr. Schroeder whether anyone said to him that the mineral rights under Henning Tract should be transferred to—by McDonald to Weyl-Zuckerman and then by Weyl-Zuckerman to Pacific Oil? Is that the purport of the question?

Mr. Nyquist: The purport of the question is to

(Testimony of George Schroeder.)

bring out the party at whose instigation the conveyance was made by the indirect route rather than the direct route.

Mr. Livingston: Oh, no. Oh, no. That would be an improper question to ask this witness, at whose instigation it was done. The proper question is—he has told us what the conversations are. Now, you may ask him about a conversation but not ask him about instigation, suggestion, or conclusion of any kind.

Mr. Nyquist: I will withdraw that question.

Q. (By Mr. Nyquist): I will ask, Mr. Schroeder, if you have any recollection of any conversations with respect to the—on the subject, let us say, of the manner in which title to the Henning Tract [171] was to be transferred from McDonald Island Farms so that it would ultimately reach Pacific Oil Company?

A. I do not recall anything like that as such.

Q. Were you particularly concerned with the manner or the route that the property took in reaching Pacific Oil Company?

Mr. Livingston: Your Honor asked him that question and he said, "No." It is repetitious.

Mr. Nyquist: No further questions.

Cross Examination

Q. (By Mr. Livingston): Mr. Schroeder, you referred in one conversation, I believe it was December 12th, 1946, to a discussion involving the acquisition by the Standard Oil Company or its sub-

(Testimony of George Schroeder.)

sidiary of certain gas rights at that time and the obtaining of an option to acquire the gas rights of **other—other gas rights** under later date which you said was August 15th, 1947. Now, please identify to the best of your recollection, which gas rights—that is, under which tract or which part of McDonald Island were to be acquired currently and which were to be acquired pursuant to an option under date of August 15th, 1947?

A. The parts to be acquired currently was the McDonald interest, that is, the McDonald Island Farms parcel on the easterly portion of the island, and the part mentioned for [172] option to be acquired in August, 1947, was the westerly part, the Weyl-Zuckerman piece, the thing that is sometimes referred to as the Henning Tract.

Q. That is right. In other words, what you had—what you said was—with respect to the physical or geographical location of the rights and the—Is that right, is that correct so far?

A. Say it again, please.

Q. All right. What was said at that time had reference to the geographical location of the rights, is that correct?

A. What was said was that they were willing to sell at that time the piece of property that was being referred to as the McDonald Island Farms which was subject to the lease between the Standard Oil Company and the McDonald Island Farms as distinguished from the one that was held by the

(Testimony of George Schroeder.)

Standard Oil Company under the lease we called the Weyl-Zuckerman lease.

Q. And when you speak of the Henning, you refer to the McDonald Tract, do you not?

A. The piece of land under the McDonald Island Farms lease, that is right.

Q. Which was the McDonald Island Farm Tract, isn't that correct?

A. Yes, that is what it means. It says the McDonald [173] Island.

Q. Well, I don't think it does say that, but we just want to clarify it now. Now, the property that was subject to option was the gas rights underneath what is known as the Henning Tract?

A. That is right.

Mr. Livingston: That is right. May we have a short recess, your Honor? There may be some further questions, something further I might want to ask Mr. Schroeder.

The Court: Yes, we will have a short recess.

(Short recess.)

Mr. Livingston: No further questions, your Honor.

Redirect Examination

Q. (By Mr. Nyquist): Mr. Schroeder, referring to Respondent's Exhibit I, memorandum of January 28th, 1947, will you identify Mr. Felix T. Smith to whom that is addressed?

A. Felix T. Smith was chief counsel for the Standard Oil Company of California at that time, presently deceased.

(Testimony of George Schroeder.)

Mr. Nyquist: No further questions.

Mr. Livingston: That is all.

Mr. Nyquist: So you may know how this is progressing, your Honor, I have one other witness which I think will take ten or fifteen minutes——

You are excused, Mr. Schroeder. [174]

(Witness excused.)

Mr. Nyquist: I have two questions that I wish to ask of petitioner's witnesses that were put on yesterday. There are two points that I wish to pursue. I think I will call as my witness on this point Mr. Von Husen.

Whereupon,

JOHN VON HUSEN

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Nyquist): Mr. Von Husen, showing you Exhibit D, and in particular the ledger sheet, I am just asking you to read certain writing that is not particularly legible.

Was this prepared by you?

A. The bookkeeper in our Stockton office prepared this ledger sheet.

Q. Can you read to me the entry dated March 31, 1951 on that sheet?

A. "March 31, 1951, transferred from surface

(Testimony of John Von Husen.)

rights of tract, three two eight thousand, three two seven six nine," and this represents the surface rights of the McDonald Tract proper which had been kept in a separate account up to this point and were transferred into the combined land account March the 31st, 1951. [175]

Q. And the following line under the same date?

A. "Increment of McDonald Island value land to \$175 per acre for a total amount of two eight eight thousand, nine forty-one eighty-one."

Q. And what does that represent?

A. That brought the book value of the 3800 acres of the McDonald Tract land which was then in our name to a total value of \$175 per acre.

Mr. Nyquist: I have no further questions.

Mr. Livingston: No questions.

(Witness excused.)

Mr. Nyquist: Now, at this time I would like to ask the permission of the Court to recall Mr. John Zuckerman for cross-examination.

Mr. Livingston: No objection.

Whereupon,

JOHN ZUCKERMAN

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was further examined and testified as follows:

Further Cross Examination

Q. (By Mr. Nyquist): Mr. Zuckerman, do you recall the occasion of a conference in the office in

(Testimony of John Zuckerman.)

the Internal Revenue Agent's office, with respect to the 1946 and 1947 tax liability of [176] Weyl-Zuckerman?

A. Which revenue agent? Mr. Potthoff?

Q. No, I am referring to the agent Mr. Cummings. Mr. Potthoff is of the Appellate staff. I am referring to a conversation in the revenue agent's office.

A. In his office?

Q. Mr. Ansel Cummings was the conferee representing the Government.

A. What date?

Q. It was in 1950.

Mr. Livingston: What dates, please?

Mr. Nyquist: March 7, 1950.

A. I don't at the moment recall it.

Q. (By Mr. Nyquist): Do you have any recollection of attending such a conference with Mr. P. K. Webster, Mr. Benton C. Coit, Mr. John Von Husen accompanying you?

A. Well, I went to one conference with those men.

Q. I show you Respondent's Exhibit E, the Protest of Weyl-Zuckerman Company, dated January 5, 1950, and ask you whether you have any recollection of having seen that document previously?

A. Well, I have seen many documents in connection with this case and this could be one of them.

Q. I suggest to you that that document was—covered [177] the subject matter of that conference and was a protest filed in advance of the conference stating the position of Weyl-Zuckerman at that

(Testimony of John Zuckerman.)

time, and ask you whether, on looking at it, in view of my statement, you recall it to be such?

Mr. Livingston: Well, I am having a little difficulty, if your Honor please, in following counsel's suggestion. If I understood him correctly, he says this document was prepared after a conference and that this document, therefore, can constitute a memorandum of what occurred at a previous conference. Is that the point?

Mr. Nyquist: No, your Honor. This is a protest which was filed in advance of a conference in the revenue agent's office stating the position of the taxpayer, and this was the subject matter—covered the subject matter of the conference which was held a few months thereafter.

Mr. Livingston: And the question is whether, by reading this, it will refresh his recollection as to what occurred afterwards?

Mr. Nyquist: No, whether it will refresh his recollection as to the nature of the document and the purpose for which it was prepared.

Mr. Livingston: Well, the document speaks for itself as a Protest, Mr. Nyquist.

Mr. Nyquist: It is a protest.

Mr. Livingston: All right, then, that is settled [178] without having the witness testifying about it.

I agree. I stipulate it is a Protest. I can stipulate likewise for the purpose for which it was prepared because we all know. That is obvious.

Mr. Nyquist: And will you stipulate that it was used at that conference of March 7th, 1950?

(Testimony of John Zuckerman.)

Mr. Livingston: You mean, was it physically present in the room?

Mr. Nyquist: Yes.

Mr. Livingston: I don't know.

Mr. Nyquist: That is what I am trying to get at through this witness.

Mr. Livingston: The question, as I understand it, was that document physically present in the room at a meeting to which Mr. Nyquist refers.

The Witness: I don't know.

Q. (By Mr. Nyquist): At that conference was there a discussion of some of the facts with respect to the transactions that have been in issue in this proceeding here? A. I don't know.

Q. I am going to read a sentence from this document and then ask you a question concerning it. I am reading it from page 3 of Exhibit E:

“After the transfer of the property * * *” and the [179] previous paragraph refers to the transfer of the property of the Henning Tract to McDonald Island by Weyl-Zuckerman, “* * * the transfer of the property had been made and recorded, the taxpayer was approached by a third party desiring to purchase all the known mineral rights located on McDonald Island.”

I am going to ask you whether you recall any statements being made at this conference in the Revenue Agent's office on the subject of that sentence that I just read?

A. I don't remember.

(Testimony of John Zuckerman.)

Mr. Livingston: It is improper—well, that is the answer, let it go.

A. I don't remember.

Mr. Nyquist: I am going to read the following sentence——

Mr. Livingston: May I interrupt just a moment? I intended to put in an objection before the answer, but I came too late. It is not proper interrogation of a witness to ask him whether certain things were said at a particular meeting and to use a document, and read from a document for that purpose or even refer to that document. The proper question was this said, was this or that said at that meeting. The witness has no relation to the document, it wasn't prepared by the witness——

The Court: Are you making an objection?

Mr. Livingston: Yes.

The Court: To what? Is there a pending question you are objecting to?

Mr. Livingston: Yes, the question.

The Court: Mr. Reporter, is there a question pending?

(Record read by the Reporter.)

Mr. Livingston: I jumped the gun because it was obvious he was going to ask the same type of a question. I am going to withdraw my objection at this time and I am going to ask the Court to have it repeated after the question is propounded.

The Court: I don't know what the question is.

Q. (By Mr. Nyquist): At this time I am going to read one more sentence from the Protest pre-

(Testimony of John Zuckerman.)

pared by the taxpayer and submitted to the Bureau of Internal Revenue, Exhibit I, "The third party, Pacific Oil Company, was interested only in the purchase of all the known mineral rights on the island as a whole for the purpose not only of extracting but also injecting natural gas for storage purposes if such occasion should arise in the future; * * *"

I am going to ask you whether you have any recollection of that topic being discussed at the conference of March 7th, 1950? [181]

Mr. Livingston: No objection.

A. Well, not having a recollection of the conference I would have a difficult time recollecting that discussion taking place. However, those are the facts as I knew them.

Q. (By Mr. Nyquist): These are the facts as you knew them?

A. That Pacific Oil Company was only interested in buying the entire gas rights on McDonald Island.

Q. But you have no recollection of making that—of a discussion of that fact at a conference of March 7th, 1950? A. No, sir.

Q. Do you have any recollection of a discussion of any of the business dealings—I will withdraw that. I will rephrase it.

Do you have any recollection of any discussion at that time or of making any statements at that time with respect to the obligation on the part of the McDonald Island Farms, Ltd. to pay off the principal amount of a bank loan on a basis that was de-

(Testimony of John Zuckerman.)

terminated by the amount of income of McDonald Island Farms? A. No.

Q. You have no recollection of any such statements—of any statements being made on that point at the conference? A. No.

Mr. Nyquist: No further questions, your Honor.

Mr. Livingston: No questions.

(Witness excused.)

Mr. Nyquist: I have one further witness, your Honor.

At this time I will call Mr. Ansel Cummings. Will you take the stand, Mr. Cummings?

Whereupon,

ANSEL CUMMINGS

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you have a seat, sir, and state your name and address, please?

The Witness: Ansel Cummings, employed by the Bureau of Internal Revenue, U. S. Treasury Department.

Direct Examination

Q. (By Mr. Nyquist): Mr. Cummings, what was your occupation in 1950?

A. I was a conferee in the office of the Internal Revenue Agent in Charge.

Q. Located where? A. In San Francisco.

Q. Did you hold a conference in the case of

(Testimony of Ansel Cummings.)

Weyl-Zuckerman and Company? A. I did.

Q. On March 17th, 1950? [183]

A. Correct.

Q. Could you tell me who was present at that conference?

A. Mr. Webster, Mr. Coit, Mr. Zuckerman, and Mr. Von Husen.

Q. Will you identify Mr. Webster? That is a new name here.

A. Mr. P. K. Webster was a certified public accountant who was representing the taxpayer.

Q. And Mr. Coit?

A. Mr. Coit was an associate in the proceedings. He was a CPA for Haskins and Sells, as I recall.

Q. Will you tell us the subject of that conference?

The Court: Which Mr. Zuckerman were you referring to?

The Witness: Mr. John Zuckerman, who at the time was President of the Petitioner, at that time taxpayer.

Q. (By Mr. Nyquist): Are you referring to Mr. John Zuckerman or Mr. Maurice Zuckerman?

A. The name was John Zuckerman.

Q. The name was John Zuckerman?

A. Yes.

Q. The gentleman who is sitting here in the Court room? (Indicating Mr. John Zuckerman.)

A. I believe that is he, yes.

Q. What was the subject of that conference?

A. The subject of the conference was based upon

(Testimony of Ansel Cummings.)

a protest which they had filed with respect to a certain mineral right previously owned by the Petitioner, transferred to a wholly-owned subsidiary and then later transferred back to Petitioner.

Q. May I ask you to state in a more general way the broader subject of the conference; that is, in terms of what was to be the—the tax liability involved, the years, and so forth?

A. Oh, the years involved were 1946 and '47, specifically, and the amount of the tax I don't recall.

Q. Now, you made some statements regarding a protest being the subject of the conference. I show you Exhibit E and ask you if that is the document that you referred to? A. That is.

Q. You will note that Exhibit E contains certain allegations of fact, and I ask you whether there was a discussion of the facts of this case at that conference? A. There was a discussion.

Q. Was there a discussion of the matter of the circumstances leading up to the sale by the taxpayer of a certain—of certain oil and gas rights to Pacific Oil Company in January of 1947? [185]

A. Yes, there was a discussion.

Q. Can you tell me what was said at that time about the circumstances leading up to that sale?

A. Well, initially the Petitioner had transferred this mineral right to its wholly-owned subsidiary—

Mr. Livingston: Pardon me, is this—I would like to know whether the witness is relating a conversa-

(Testimony of Ansel Cummings.)

tion now, and if so, who was the one that made the statement that he is now relating?

The Witness: This—I am not relating any conversation, I am relating the circumstances of the conference.

Mr. Livingston: Well, then, I object to the—I object that the answer is not directed to the question. The question calls specifically for a conversation.

Q. (By Mr. Nyquist): Mr. Cummings, the Court is already familiar with the background circumstances with the transfer of the Henning Tract to the subsidiary, and consequently that background is not necessary in answering any specific question about the circumstances leading up to the sale to Pacific Oil in January of 1947.

A. Well, it was discussed that after the subsidiary had acquired these particular rights the taxpayer was approached by a third party who desired to buy all of the mineral rights on both pieces of property. [186]

Q. Do you recall which of the persons present at the conference made that statement?

A. Not definitely, but I am of the opinion it was Mr. Webster who was the general spokesmar for the four, representing the taxpayer, including the taxpayer.

Q. And when you said "the taxpayer," did you refer to Mr.—were you referring to the corporation or to Mr. Zuckerman personally in that sense?

(Testimony of Ansel Cummings.)

A. The corporation was the taxpayer in that instance.

Q. And were Mr. Von Husen and Mr. John Zuckerman present at the time that statement was made?

A. They were present throughout the entire hearing.

Q. And was the subject of the manner of re-conveying—of conveying the property—I will be more specific.

Was the subject of the route taken by the conveyance of the gas rights under the Henning Tract from McDonald Island Farms to Weyl-Zuckerman and then to Pacific Oil Company discussed?

A. Yes.

Q. Was a reason given for the conveyance taking that route? A. Yes.

Q. Will you state that reason that was given?

A. The reason given at the time was that the purchaser desired to obtain both mineral rights from one owner, and at [187] the same time.

Q. Was the subject of a bank borrowing by McDonald Island Farms with the surface rights of McDonald Island as security mentioned at the conference? A. It was.

Q. Was any mention made at that time of any obligation on the part of McDonald Island Farms to make payments on principal in proportion to or measured by the income of McDonald Island Farms? A. No, there wasn't.

Mr. Nyquist: I have no further questions.

(Testimony of Ansel Cummings.)

Cross Examination

Q. (By Mr. Livingston): What was the date of this conversation, please?

A. March 9th, 1950, is my recollection.

Q. And I believe you said that the John Zuckerman that was present at the conversation was the President of Weyl-Zuckerman and Company, is that right?

A. That's my recollection.

Q. Have you any documentary evidence to support that statement?

A. It should be—I don't know that there definitely is any unless it is in the Protest.

Q. Well, will you examine the Protest and see whether he is so described? [188]

(Witness examines document.)

A. It doesn't show in here, no.

Q. It doesn't show who the president is?

A. That is correct.

Q. And then, so that the identity of John Zuckerman as President of the Weyl-Zuckerman Company is something that you recall from that conversation, is that right?

A. My recollection is that he was discussed as being the then president at the date of conference hearing. Whether or not he was prior to that, I do not know.

Q. But on—And do you recall who it was that said in substance, at that time, "John Zuckerman is today the President" or "is now the President of Weyl-Zuckerman and Company"?

A. I don't recall that specifically at all.

(Testimony of Ansel Cummings.)

Q. You don't recall who said it? Did you make any notes of that conference?

A. I did make notes at the time, yes.

Q. Where are they?

A. They are destroyed.

Q. How long did you keep them?

A. Until December of 1952.

Q. And is it customary to destroy notes of conferences?

A. Well, there is no established custom. The incidents surrounding this is that we were removed from our old quarters, my job was—I was transferred to a different [189] position and most of the files were destroyed such as working papers, at that time. They were not carried over.

Q. Did you make any report at any time based upon the contents of your notes? A. I did.

Q. And may I see that, please?

A. The report is in the custody of Mr. Nyquist.

Mr. Livingston: I would like to see it, if I may.

Mr. Nyquist: Your Honor, this report is a report made by a revenue agent to his superior. I see no occasion for furnishing the taxpayer with the report. I don't believe it has any authority for furnishing him with it.

The Court: What are you trying to get at, Mr. Livingston?

Mr. Livingston: I am trying to find out, to cross-examine the witness for the purpose of determining the accuracy of his recollection.

He has told us that—he has undertaken to tell

(Testimony of Ansel Cummings.)

us, from his recollection apparently, what was said in a particular meeting in 1950 which is some four years ago. It now develops he made notes of that conversation and he has destroyed the notes for reasons that are quite adequate, but that those notes are embodied, or rather the substance of the notes are embodied in a report. Therefore, if the report was made, that would be—would indicate much more accurately the [190] exact details of the conversation and would assist us materially in determining what was actually said at the meeting he has described.

I assume if the notes were here we could have access to them.

Mr. Nyquist: Your Honor, I wish to correct the record in one point. The witness, I don't believe, stated anything about his notes being embodied in the report. He testified he made a report. I don't believe——

Mr. Livingston: Let me ask the question a second time and see if I made a mistake.

Q. (By Mr. Livingston): Mr. Cummings, didn't you tell me a little while ago that on the basis of these notes you made a report?

A. I answer "Yes" to your question. I don't recall exactly what your question was, but this report is founded upon the notes taken during the hearing, yes.

Q. Yes.

A. Plus other occurrences which I retained in my mind.

(Testimony of Ansel Cummings.)

Mr. Livingston: "Yes." That is it. I submit the question, your Honor.

The Court: Mr. Nyquist, are you willing to let Mr. Livingston examine the report?

Mr. Nyquist: Yes, I am, your Honor.

I would be willing to stipulate that it may be put [191] in evidence.

Mr. Livingston: May I see it?

Mr. Nyquist: Don't mark it up, please.

Mr. Livingston: I will rub the few marks I make out.

Q. (By Mr. Livingston): Now, in that conversation—in the conversation of March 7th, 1950, was anything said on the subject of the transfer of the Henning Tract including both the surface rights and the mineral or gas rights to McDonald Island Farms, Ltd.? A. It was discussed.

Q. The subject was mentioned? A. Yes.

Q. And was the fact mentioned in that conversation that the consideration specified or stipulated for that transfer was an amount equal to the cost, the initial cost of Henning Tract?

A. I don't know that it was particularly worded that way, no. The amount of money was the definite statement.

Mr. Nyquist: Your Honor, I object to this course of cross examination. This is an obvious attempt to bring out certain hearsay evidence and not a matter of cross-examining the witness to test his recollection or anything of that sort.

(Testimony of Ansel Cummings.)

The Court: What is the purpose of the examination?

Mr. Livingston: To ascertain everything that was said material to this litigation at the meeting of March 7th, [192] 1950. The witness has testified that he recalls certain things having been said. That makes it proper for me, on cross-examination, to inquire whether other things were said, and if so, to bring them out so that the entire conversation can be revealed.

Any time that a witness testifies to a conversation on cross-examination, as I view it, it is proper to investigate all the statements made at that time, at that same conversation, which are material to the subject.

Mr. Nyquist: Your Honor, this was a—quite probably was a lengthy conference at which there were a number of topics discussed. I asked this witness specific questions about specific topics. We will be here all day if we are allowed to try the case to that conference.

The conference, I don't think, should be regarded as a single conversation for admitting the whole conversation.

The Court: Mr. Livingston, are you challenging the witness' recollection or the accuracy of his statement of what he remembers, is that the purport of the questions that you are putting to him?

Mr. Livingston: I don't say that I challenge his recollection, I am merely trying to—

The Court: You want to probe it?

(Testimony of Ansel Cummings.)

Mr. Livingston: Probe it, that is it. Challenge. Means that I am indicating to the Court that I disbelieve [193] him. Now, it may be that I don't agree with his version of the conversation.

The Court: Well, I will let you, within a reasonable limit, pursue the matter but not for the purpose of establishing the truth or falsity of the content of any statements which he——

Mr. Livingston: Oh, no. Oh, no. I have no such intention.

The Court: You don't seek to produce any hearsay evidence through this witness?

Mr. Livingston: Oh, no.

The Court: Well, for the limited purpose of probing the accuracy of his recollection I will permit you to proceed within reasonable limits.

Mr. Livingston: All right, now, what is the pending question?

(Question read by the Reporter.)

Q. (By Mr. Livingston): Let's see if we can stimulate your recollection in that respect. What was said about the price—what, if anything, was said about the price at which Henning Tract was transferred to McDonald Island Farms, Ltd. by Weyl-Zuckerman and Company?

A. Well, the transaction was discussed.

Q. Now listen, please. Bear in mind the question. [194] What was said as to the price, if anything? Try to answer that specifically, if you can.

A. Well, I only remember specifically that the money, the amount of money involved, as to any

(Testimony of Ansel Cummings.)

particular part of the specific discussion at this time I don't recall.

Q. You have no recollection on that subject? In other words, don't you recall that it was stated that the price was—can't you recall that it was stated at that conference that the price was \$338,375?

A. I recall that the price was stated, yes, if that is the price.

Q. All right. Now, do you recall now—Now then, don't you recall that it was stated that that price represented the original cost of Henning Tract?

A. I don't recall that that was particularly stated in the conference, no.

Q. I am not asking you whether you recall it was particularly stated. My question is, was it stated at all, particularly or otherwise?

A. I don't recall.

Q. Is it your recollection that someone said at that conversation that the prospective buyer of the gas rights on the entire island wanted to purchase those rights from a single owner?

A. That is my recollection. [195]

Q. Yes. Well, now, I call your attention to the following statement that is contained in your report. I will show it to you before I propound the question.

(Counsel then handed the document to witness.)

“Taxpayer further states that after the transfer of the property had been made and recorded, the taxpayer was approached by a third party desiring to purchase all the known mineral rights located on

(Testimony of Ansel Cummings.)

McDonald Island, and that the third party, Pacific Oil Company, was interested only in the purchase of all the known mineral rights on the island as a whole for the purpose of not only extracting but also injecting natural gas for storage purposes."

Will you kindly read that?

(Statement read by the witness.)

Q. Now, having read that and having in mind that this is a statement prepared by you from the original notes of the conversation, I will ask you if it is not a fact that what was said at that conference was that the Pacific Oil Company was interested only in the purchase of all of the mineral rights on the island? Was that stated at the conference?

A. Not in that particular way, no.

Q. Was it stated in this particular way: "Taxpayer further states that after the transfer of the property had been made and recorded, the taxpayer was approached by a third party desiring to purchase all the known mineral rights [196] located on McDonald Island, and that the third party, Pacific Oil Company, was interested only in the purchase of all the known mineral rights on the island as a whole for the purpose of not only extracting but also injecting natural gas for storage purposes."

Q. My question is, was it stated in that particular way?

A. Not necessarily. That would be a summation of the various conversations that we had in connection with it.

(Testimony of Ansel Cummings.)

Q. Well, do you deny——

A. That would be the result.

Q. Do you deny——

A. That would be the determination.

Q. Pardon me. Do you deny that in the course of that conversation Mr. Webster or somebody on behalf of Weyl-Zuckerman and Company stated in substance what you have recorded in this statement?

A. Do I deny what?

Q. Do you deny that in the course of that conversation Mr. Webster or someone else speaking for Weyl-Zuckerman and Company stated in substance what I have just read to you from this report?

A. Well, I couldn't deny it. I put it in my report.

Q. So you admit that he did make that statement in substance? [197]

A. What statement in substance, specifically?

Q. Read it again, please.

(Counsel handed document to witness.)

A. I would like for you to rephrase your question so I can get at it, exactly what you mean.

Q. Read it and tell me what there is about the question that confuses you.

A. What statement in substance? That is what I want to know, what statement?

Q. The statement that appears and as reported, which I have read to you on three different occasions now.

Q. You want to know if Mr. Webster himself made this statement?

(Testimony of Ansel Cummings.)

Q. Mr. Webster or anybody else speaking on behalf of the taxpayer, Weyl-Zuckerman and Company.

A. The way I will answer that is this: This did come out of the conference hearing on this matter, yes. It was not one sentence and it may have been discussed at various times throughout the conference, but that is the conclusion that I have derived from that conversation, yes.

Q. By the way, this transferring an asset by a subsidiary—Pardon me.

When a parent company makes a transfer of an asset to the subsidiary, is it customary to transfer that asset at cost? [198]

Mr. Nyquist: Objection, your Honor. This is not proper cross examination. It has nothing to do with the recollection of this witness and also calls for a conclusion of the witness as to what is proper.

The Court: Sustained.

Mr. Livingston: That is all.

Mr. Nyquist: That is all. Respondent rests, your Honor.

Mr. Livingston: We rest, your Honor.

The Court: Before I announce the times for briefs, I would like to call to counsel's attention one aspect of this case that still troubles me, and I hope the briefs may clear it up.

There was testimony with respect to the form in which the transfer to Standard's nominee ultimately took. That is, that the mineral rights under the Henning Tract were routed indirectly from Me-

Donald to the petitioner and then to the nominee of Standard. I don't quite understand just what the Government is attempting to prove in that connection.

If the transfer were made directly by McDonald to Standard, to Standard's nominee, I can't understand how there would be any capital gain at all that would be applicable to this petition because it would be the sale that would have been made by McDonald and not by this Petitioner. So then, if the transaction is isolated and, by the transaction I am [199] referring to the events occurring in December and January of 1946 and '47, the events of that transaction are telescoped, I am not quite sure where that gets the Government, because it would seem to me that if the Henning Tract were treated as remaining in McDonald, I don't see where there is any deficiency against this petitioner.

Now, it seemed to me that the crucial factual matter to be considered here is whether—or rather, is the nature of the transfer in July of '46, I think it was——

Mr. Livingston: June, your Honor.

The Court: June of '46 to McDonald. I think the essence of the case, as I see it, at this point, I would like your briefs to undertake to clarify it for me, is whether or not that transfer of June of '46 was made with the intention that the Henning Tract be present only for a transitory period, in McDonald, to be pulled back again into the Petitioner for purposes of ultimate disposition, so that it seems to me that the crucial question is not so much what hap-

pened in December and January as what the purpose of the transfer in June of '46 may have been, and I am not asking for any argument of counsel at this point on it.

Perhaps they will undertake to clarify it in briefs unless counsel desires to make a very short statement.

Mr. Nyquist: I might just make a word of explanation on that point, your Honor. [200]

We have viewed the case, I believe, as you have outlined it there. The importance of the transfer in December of '46 or January of '47, the importance of the testimony on that point is—the respondent put in, is for disproving any contention the petitioner might be making as the only reason this got back to Weyl-Zuckerman Company is because the buyer, Standard Oil, insisted upon it.

The Court: That is sort of a rebuttal type testimony rather than the foundation for your case.

Mr. Nyquist: Our case is on the original transfer to the subsidiary under circumstances when a sale of the tract was pretty obviously contemplated, and that the testimony of the witness regarding reasons for transfer of the surface rights in no way touched upon transferring the gas rights to the subsidiary and remaining in the parent.

The Court: I just called this to your attention and it may be dealt with in the briefs.

Petitioner's brief is due within forty-five days, the Respondent may reply thirty days thereafter, and the Petitioner may have twenty days in which to answer the Respondent.

Mr. Nyquist: May I ask for forty-five days, your Honor? We are on the West Coast. It takes us almost a week to get their brief, and then we have mailing delays as well as—and the fact that this is a complicated factual issue, [201] it will require a lot of cross-referencing and a lengthy transcript.

The Court: Well, it is my practice to allow only thirty days. If you find that insufficient, I will entertain a motion for an extension of time at the appropriate time.

Mr. Nyquist: Yes, your Honor.

Mr. Livingston: I will try to make a note on my office record to let Mr. Nyquist have a copy of my brief when it is mailed. I think I have done that in the past.

The Court: That is customary, and I believe it might expedite matters.

Mr. Livingston: The last case we had together it was done.

Mr. Nyquist: I appreciate that, your Honor. Unfortunately, I am not able to reciprocate because my brief has to be reviewed in Washington before it is in final form.

May I ask also, your Honor, may we be given permission to withdraw any exhibits we may have introduced that we wish to substitute photostats for?

I am covering it in general.

The Court: You may do so, except I would like, as far as possible, that the originals be left with me for the period during which I must consider them. If you wish to withdraw them temporarily for the

purpose of obtaining photostats, that is perfectly all right, but I would like the originals [202] returned so that I might have them to work with, when I come to study the transcript in the case.

Mr. Nyquist: Thank you, your Honor.

Mr. Livingston. The only question that arises in that case, would you like the minute book of the McDonald Farms to stay here?

If so, we are quite willing that it do so.

The Court: Well, that is a rather bulky document and only two pages of that minute book are involved. Perhaps, as to that, it would be better to withdraw the book and substitute photostatic copies of the two pages. But, I ask counsel to make sure that the photostats are legible.

Mr. Livingston: We mail those to Washington, the photostats?

The Court: The Clerk will give you the instructions.

(Whereupon, at 12:40 p.m., the hearing was closed.)

[Endorsed]: T.C.U.S. Filed April 5, 1954.

[Endorsed]: No. 14785. United States Court of Appeals for the Ninth Circuit. Weyl-Zuckerman & Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: June 6, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14785

WEYL-ZUCKERMAN & COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Defendant.

PETITIONER'S STATEMENT OF POINTS

Henning Tract and McDonald Tract are farming properties located in the Delta Region of the San Joaquin River in San Joaquin County, California, and together comprise an island in the Delta known as McDonald Island. A slough runs through the island and forms the dividing line between the two tracts.

Prior to March 13, 1946, the ownership of said land was divided as follows: Petitioner owned in its entirety the Henning Tract. The McDonald Island Tract was owned by McDonald Island Farms Limited, hereinafter referred to as McDonald, Ltd., and the stock of this corporation, in turn, belonged one-half to Holly Sugar Corporation, hereinafter referred to as Holly, and one-half to petitioner.

On March 13, 1946, McDonald, Ltd., as a result of the insistence of Holly, declared a dividend in kind of the mineral rights in McDonald Tract and petitioner and Holly each received an undivided one-half interest in said rights. At the same time, Holly gave petitioner an option to purchase Holly's one-half interest, and on June 5, 1946, petitioner exercised said option, thereby becoming the owner of all the mineral rights of McDonald Tract.

On March 13, 1946, petitioner purchased from Holly the latter's one-half interest in the shares of stock of McDonald, Ltd. In order to make said purchase, it was necessary for petitioner to arrange for a substantial loan, and petitioner borrowed money from the Bank of America as a temporary expedient. In order to place the loan on a long-term basis, it was necessary to give as security the entire island, including both Henning Tract and McDonald Tract. This presented two problems: first, one of the corporations must be selected as the owner and grantor to be named in the deed of trust; and second, the extent of the security must be negotiated. For various business reasons established by the evidence, McDonald, Ltd. was chosen to act as the borrower.

Accordingly, on June 27, 1946, petitioner executed a grant, bargain and sale deed in the customary form, of Henning Tract, to McDonald, Ltd. and McDonald, Ltd. thereby became the owner of Henning Tract. McDonald, Ltd. executed a promissory note for \$720,000 to Bank of America, together with a deed of trust of McDonald Island, excepting the mineral rights therein. The proceeds of the loan were used to pay for the property acquired from petitioner (which, in turn, paid off its obligations to the Bank of America) and to remove various encumbrances so as to provide a clear title to the two tracts comprising the island.

The mineral rights to both tracts of land had previously been leased to Standard Oil Company, and said leases provided for royalty payments. It was to the advantage of McDonald, Ltd. to reserve these royalties rather than to assign them as part of the security for the loan. The Bank acquiesced and consequently, as above stated, the deed of trust hypothecated only the surface rights in the island.

As a part of the same transaction, McDonald, Ltd. agreed in writing with the Bank of America that annual payments of \$28,800 on account of principal of the loan would be made to the Bank, and that in addition thereto there would be paid on account of principal a sum equivalent to the difference between \$28,800 and 35% of the net profits of the corporation for the prior fiscal year; "net profits" here used meaning profits before depreciation but after provision for income taxes.

Subsequent to the transfer of the properties to

McDonald, Ltd. and in July of 1946, there was discussion between petitioner and Standard Oil Company for sale of the gas rights in said property. Standard Oil Company had previously in November of 1945 made an offer of \$500,000 which had been rejected, and the subject of sale of the gas rights had not again been mentioned until July of 1946. Thereafter, on December 12, 1946, a meeting was held between John Zuckerman, representing petitioner, and Schroeder, representing Standard Oil Company, at which an agreement was reached on a figure of \$650,000 as the price of the gas rights (subject to some adjustments) and eventually the sale was consummated to Pacific Oil Company, a subsidiary of Standard Oil Company, as the buyer.

At the time of said sale, McDonald, Ltd. was the owner of Henning Tract, including the surface and mineral rights therein, as appears above. By reason of the agreement collateral to the deed of trust, as above stated, if McDonald, Ltd. had conveyed the gas rights in Henning Tract direct to the buyer, McDonald, Ltd. would have received a net profit and would have been compelled to make a payment to the Bank of America in the amount of approximately \$50,000 on account of principal of the loan of \$720,000, in addition to the annual amortization requirements. McDonald, Ltd., needed all available cash and, therefore, on December 21, 1946, in order to avoid the penalty, and in preparation for the consummation of the sale, McDonald, Ltd., declared a dividend in kind of the mineral rights in Henning Tract to petitioner as its sole stockholder. There-

upon, a deed of mineral rights bearing date December 21, 1946, was executed by McDonald, Ltd., to petitioner and was recorded January 10, 1947. Consequently, petitioner was the owner of the mineral rights in both Henning Tract and McDonald Tract and was in a position to make the conveyance to Pacific Oil Company of mineral rights in Henning Tract.

The conveyance of the mineral rights in Henning Tract by McDonald, Ltd. to petitioner, pursuant to said dividend, was made as the law requires (Section 115j, Revenue Code) on the basis of the fair market value, which was ascertained to be \$230,000. This value represented the proportionate share of the Henning Tract rights with respect to the purchase price to be paid by Pacific Oil Company for the rights in the entire island comprising both McDonald and Henning Tracts. After deducting the dividends received credit of 85%, the balance was taxed at the normal and surtax rates amounting to \$13,110. This, together with taxes on other income, was paid by petitioner in 1947. The portion of the sales price received by petitioner from Pacific Oil Company for the gas rights in Henning Tract was the same amount as that used for determining the income received by petitioner as the result of the dividend; consequently, there was no capital gain or loss in the sale of the Henning Tract gas rights to Pacific Oil Company.

On the basis of the foregoing facts, it follows that the purpose in conveying Henning Tract to McDonald, Ltd. was an ordinary business purpose and

there was no reason why it should have occurred to anyone that only the surface rights should be conveyed to McDonald, Ltd. There is no evidence that such an idea was entertained. On the other hand, there is ample evidence that the transaction took place in the ordinary course of business without any ulterior purpose or plan to frustrate taxation.

Hence, the Commissioner erred in levying a deficiency against petitioner and the Tax Court erred in affirming the deficiency.

There is no evidence that the conveyance was a subterfuge or that petitioner's purpose from the beginning was to step up the cost basis of the rights in Henning Tract and by that means reduce the capital gain on a subsequent sale thereof.

There is no evidence that a possible sale to Standard Oil Company was contemplated at the time of the conveyance of Henning Tract by petitioner to McDonald, Ltd., nor that said conveyance was made in anticipation of a sale to Standard Oil Company and as a step in a program to accomplish a sale in such manner as to avoid or reduce taxes.

There is no evidence that at the time of the conveyance of Henning Tract to McDonald, Ltd., petitioner planned or intended to have the mineral rights therein reconveyed to it.

The evidence shows without conflict that the conveyance of Henning Tract in its entirety was in good faith and for a genuine business purpose.

The findings of fact do not justify the conclusion of the Tax Court that at the time of the conveyance

of Henning Tract by petitioner to McDonald, Ltd., petitioner contemplated a possible sale to Standard Oil Company.

The findings of fact do not justify the conclusion of the Tax Court that said conveyance to McDonald, Ltd., was made in anticipation of a sale to Standard Oil Company or as a step in a program to accomplish the sale in such manner as to avoid or reduce taxes.

The findings of fact do not justify the conclusion of the Tax Court that at the time of the conveyance of Henning Tract to McDonald, Ltd., petitioner intended to have the mineral rights therein reconveyed to it.

The findings of fact do not justify the conclusion of the Tax Court that the conveyance to McDonald, Ltd., was a subterfuge or that petitioner's purpose from the beginning was to step up the cost basis of the mineral rights in Henning Tract and by that means reduce the capital gain on a subsequent sale thereof.

Dated: June 23, 1955.

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[Endorsed]: Filed June 24, 1955. Paul P. O'Brien,
Clerk.

No. 14,785

United States Court of Appeals
For the Ninth Circuit

WEYL-ZUCKERMAN & COMPANY,	}
VS.	
COMMISSIONER OF INTERNAL REVENUE,	
	<i>Petitioner,</i>
	<i>Respondent.</i>

OPENING BRIEF OF PETITIONER.

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FILED

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PAUL P. O'BRIEN, CLERK

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United States Court of Appeals For the Ninth Circuit

WEYL-ZUCKERMAN & COMPANY,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING BRIEF OF PETITIONER.

1. Statement of the case in compliance with Rule 18(2)(c).

The question to be decided is whether the conveyance of property by the petitioner was made without business purpose and was the initial step in a program the objective of which was to evade capital gain taxes.

McDonald Island is located in the delta region of the San Joaquin River. It comprises two tracts separated from each other by a slough. One is called Henning Tract and the other McDonald Tract.

The petitioner, Weyl-Zuckerman & Co., a corporation, sometimes hereinafter called Weyl—and its predecessor partnership had long been the owners and farmers of Henning Tract.

McDonald Island Farms, Ltd., a corporation,—sometimes hereinafter called McDonald, Ltd.—had for many years owned and operated McDonald Tract.

Until 1931 there was no connection between the two companies.

In 1931, in association with another company—Holly Sugar Corporation—Weyl acquired an interest in McDonald Island Farms, Ltd., and by a series of transactions during the year 1946 Weyl bought out Holly Sugar Corporation. One of the consequences was that Weyl became the owner of all of the capital stock of McDonald Island Farms, Ltd.

To finance the transaction a large loan was negotiated from the Bank of America. In this connection it was decided that the farming operations of the entire island should be consolidated. For various reasons the subsidiary—McDonald—was selected and on June 27, 1946, Weyl conveyed Henning Tract to McDonald, Ltd. In turn, McDonald, Ltd. executed to the Bank a trust deed of the entire island, excepting the mineral rights which had in the meantime become of considerable value as the result of discovery of gas in 1935. Weyl continued to farm other property located elsewhere in Oregon and Utah.

Six months later—on December 21, 1946—the mineral rights in the entire island were sold to a subsidiary of Standard Oil Co., which ever since 1935 had been the lessee of the mineral rights under separate leases executed by the two companies.

At the time of this sale—as the result of the transactions above set forth—each of the two companies had become the owner of the mineral rights under the opposite portion of the island.

The conveyance to the Standard Oil subsidiary—Pacific Oil Co.—of the rights in McDonald Tract was made by Weyl direct to Pacific Oil.

But McDonald, Ltd., did not make a direct transfer to Pacific of the rights in Henning Tract. The reason for not pursuing that course was that it would have subjected McDonald, Ltd. to a penalty under the provisions of the trust deed which McDonald, Ltd. had executed to the Bank. To avoid this penalty McDonald, Ltd. declared a dividend in kind of the rights in Henning Tract and conveyed them to its sole stockholder, Weyl-Zuckerman & Company. Thereupon Weyl made the conveyance to Pacific Oil.

The Tax Court's decision—in the form of a conclusion drawn from the evidence—is that the plan was hatched in June, 1946, at the time when Weyl transferred Henning Tract to McDonald, Ltd.; that at that time Weyl had the intention to reacquire the mineral rights in Henning Tract at a stepped-up cost basis and thereupon sell them to the Oil Company; that the mineral rights must be deemed to have been retained by Weyl; and that insofar as its deed to McDonald Island Farms, Ltd. of Henning Tract in its entirety effected a transfer of the mineral rights in the land, the deed must be disregarded as sham.

2. Statement of petitioner's contentions and specification of errors.

The petitioner contends:

(1) That there is no evidence to justify the conclusion of the Tax Court;

(2) That when McDonald Island Farms, Ltd. was selected to farm the entire island and became the borrower from the Bank and the grantor in the deed of trust, the transfer of Henning Tract to McDonald Island Farms, Ltd. in its entirety was the natural course of business;

(3) That at that time—in June 1946—there was not even a likelihood of a sale of mineral rights to the Oil Company;

(4) That the so-called circumstantial evidence on which the Tax Court's decision is based consists of nothing more than an unwarranted theory that the business purpose of Weyl's conveyance to McDonald Island Farms, Ltd. of Henning Tract should have been accomplished by a transfer of the surface rights alone without the mineral rights;

(5) That to divorce the mineral rights from the surface rights would have been an unusual proceeding;

(6) That the failure to divorce them and the conveyance of Henning Tract in its entirety does not constitute circumstantial, or any evidence, authorizing the inference of a present intent to evade taxes by recapture of the mineral rights, nor does such an inference follow from the fact that six months later the mineral rights were returned to Weyl as a dividend in kind;

(7) That the only transaction which the Commissioner could have questioned was the dividend in kind by which McDonald Island Farms, Ltd. conveyed to Weyl the rights in Henning Tract;

(8) That any attack on the integrity of that dividend—if successful—would authorize the Commissioner to tax McDonald, Ltd. on the theory that its conveyance must

be deemed to have been made direct to the Oil Company with a resultant capital gain;

(9) That the possibility that McDonald, Ltd. was subject to such a tax and that the Commissioner failed to levy a deficiency against that company does not justify the Commissioner in charging Weyl with a capital gain on a theory which has no basis in fact;

(10) That the Tax Court's conclusion in favor of the Commissioner's theory involves speculation and conjecture and is not supported by any evidence.

3. Statement of facts with appropriate reference to findings and evidence.

Henning Tract is farming property located on one portion of McDonald Island in the delta region of the San Joaquin River in San Joaquin County, California. The tract was acquired by petitioner prior to 1932. It had been formerly owned by members of the Zuckerman family by whom the petitioner, Weyl-Zuckerman & Co., had been formed. (findings, T. pp. 25-26.)

Contiguous to Henning Tract was another known as McDonald Tract owned by McDonald Island Farms, Ltd. The two comprised an island in the delta known as McDonald Island. A slough runs through the island and forms the dividing line between the two tracts. Both had been farmed extensively year after year under separate ownership. (findings T. pp. 25-26.)

In 1931, members of the Zuckerman family purchased one-half of the outstanding shares of McDonald, Ltd. at the same time Holly Sugar Corporation (sometimes hereinafter called Holly) purchased the remaining one-half

shares. Thereafter in 1934, the Zuckermans transferred their shares to Weyl-Zuckerman & Co. in consideration for shares of that company. (stip. par. 4; findings, T. pp. 25-26.)

In 1935 gas was discovered under the surface of the island. Both Henning and McDonald tracts were in the same gas field. On November 18, 1935, Weyl leased to Standard Oil Company the mineral rights in Henning Tract. McDonald, Ltd. also leased to Standard Oil Company the mineral rights in McDonald Tract. (Ex. 5, deed from Weyl to Pacific Oil Company containing recitals of leases; findings, T. pp. 25-26.)

In later years the surface and mineral rights in McDonald Tract were separated as the result of the insistence on the part of Holly that McDonald, Ltd. declare dividends to its two stockholders.

First, there was a dividend in kind declared August 11, 1943, by McDonald, Ltd. of a two thirds interest in the surface rights of McDonald Tract. Consequently, Holly received a one-third undivided interest and Weyl received an undivided one-third interest. McDonald, Ltd. retained the remaining one-third undivided interest. McDonald, Ltd. also continued to own the mineral rights in McDonald Tract. (stip. par. 5; findings, T. pp. 26-27.)

Eventually, on December 27, 1944, pursuant to an option theretofore given to Weyl, Holly sold its one-third undivided interest in the surface rights of McDonald Tract. The option was not exercised by Weyl, but by a partnership composed largely of stockholders of Weyl. Accordingly, the surface rights were conveyed to this partnership. (stip. par. 5, T. p. 23; findings, T. p. 27.)

On June 15, 1946, the partnership sold this interest to Weyl so that as of that date Weyl was the owner of an undivided two-thirds interest in the surface rights, but no formal conveyance was executed. The remaining one-third was still retained by McDonald, Ltd., the corporation which had originally owned the entire fee. (findings, T. p. 30.)

In the meantime, Holly had been urging a dividend of the mineral rights in McDonald Tract. This was at first rejected by the board of directors. Holly renewed its request and Weyl consented to the declaration of the dividend on condition that Holly give Weyl an option to buy its share of the dividend. On March 13, 1946, McDonald, Ltd. declared the dividend and Weyl and Holly each received an undivided one-half interest in the rights. At the same time, Holly gave Weyl an option to purchase Holly's one-half interest in the mineral rights of McDonald Tract. On June 5, 1946, the option was exercised and Weyl became the owner of all the mineral rights therein. (findings, T. p. 28.)

On March 13, 1946, Weyl also purchased from Holly the latter's one-half interest in the shares of stock of McDonald, Ltd. Thereupon Weyl became the owner of all of the outstanding stock of McDonald, Ltd. (findings, T. p. 28.)

All during this time, while these transactions were taking place involving the resultant separation of surface and mineral rights in McDonald Tract, there was no such division with respect to the adjoining part of the island. Henning Tract in its entirety—including, of course, both

surface and subsurface rights—was continuously in single ownership—the property of Weyl. (findings, T. p. 30.)

Weyl's acquisition of Holly's interest in McDonald, Ltd. required considerable financing. Weyl borrowed money from the Bank of America as a temporary expedient. (T. p. 138.) In order to place the loan on a long-term basis, it was necessary to give as security the entire island, including both Henning Tract and McDonald Tract. This presented two problems: First, one of the corporations must be selected as the owner and grantor to be named in the deed of trust; second, the extent of the security must be negotiated. For adequate business reasons, which will be discussed later, McDonald, Ltd. was chosen to act as the borrower. (findings, T. pp. 29-30.)

Accordingly, on June 27, 1946, Weyl executed several conveyances to McDonald, Ltd. One of these was a grant, bargain and sale deed of Henning Tract. Since this tract had never been segregated as to surface and subsurface rights, no such segregation was made in the conveyance. The deed was in the customary form which is normally adopted in business transactions and McDonald, Ltd. became—for the first time in its history—the owner of Henning Tract. (findings, T. p. 30.)

McDonald, Ltd. borrowed \$720,000 from the Bank of America. The proceeds of the loan were used to pay for the property acquired from Weyl (which, in turn, paid off its obligations to the Bank); to remove various encumbrances so as to provide a clear title; and to satisfy other items of indebtedness. (findings, T. pp. 28-29; T. pp. 137-139.)

The leases of mineral rights to Standard Oil Company provided for royalty payments. It was to the advantage of McDonald, Ltd. to preserve these royalties rather than to assign them to the Bank as part of the security for the loan. The Bank acquiesced. Consequently, the mineral rights in the island were excluded from the operation of the deed of trust. (findings, T. p. 29.)

As a part of the same transaction, McDonald, Ltd. agreed in writing with the Bank of America that annual payments of \$28,800 on account of principal of the loan would be made to the Bank and that, in addition thereto, there would be paid on account of principal a sum equivalent to the difference between \$28,800 and "35% of the net profits of the corporation for the prior fiscal year; net profits as here used shall mean profits before depreciation, but after provision for Income Taxes". (findings, T. pp. 29-30.)

The significance of this provision is that when an opportunity arose later to sell the mineral rights, a direct conveyance to the purchaser would have resulted in a profit, so that McDonald, Ltd. would have become obligated to pay \$50,000 to the Bank on account of principal of the indebtedness. It was to avoid this penalty that the expedient of a dividend from the subsidiary to the parent was adopted.

The gas field in which both the Henning Tract and the McDonald Tract were located also included two other properties in the vicinity owned, respectively, by Mayberry and Tilden. As gas was withdrawn from the field, Standard Oil Company determined the percentage to be allot-

ted to each of the four properties and paid royalties on that basis. (findings, T. p. 31.)

For several years prior to 1946 there had been a dispute between the Standard Oil Company and Weyl as to the allotment. Another point in controversy between Weyl and Standard was based on the drilling of a well known as Mayberry No. 2 on the Mayberry property. Weyl's contention was that by reason of the location of this well, it was Standard's obligation under the lease with McDonald, Ltd. to drill an offset well on McDonald Tract. (id.)

In November, 1945, George Schroeder, acting for Standard Oil Company, offered \$500,000 for the mineral rights in the island. This was rejected. (findings, T. p. 27.)

In July, 1946—about a month after Weyl obtained complete control of McDonald, Ltd. and its property—Weyl offered to sell the gas rights to Standard Oil Company for \$875,000, but it was indicated that Weyl would be willing to reduce the price to \$820,000. The offer was rejected. (findings, T. p. 31.)

In the interval between these two offers the subject of sale had not been mentioned. Likewise, the subject was dropped after the rejection of Weyl's offer. (See testimony of Schroeder, the Commissioner's witness; T. pp. 151-153; 157.)

In the latter part of 1946 litigation appeared imminent. (findings, T. p. 31.) On December 12, 1946, there was a meeting between John Zuckerman and Schroeder. This led to an agreement on a figure of \$650,000 as the price of the gas rights, subject to adjustment on account of the royalties paid during 1946, during the interval since Schroe-

der's first offer of \$500,000, resulting in a net figure of \$609,514.46. Shortly thereafter the sale was consummated to Pacific Oil Co., a subsidiary of Standard Oil Co., as the buyer. (testimony of Schroeder, T. p. 158.)

When the negotiations began on December 12, 1946, McDonald, Ltd. was—as appears above—the owner of Henning Tract, including the surface and mineral rights therein. By reason of the agreement collateral to the deed of trust, as above set forth, if McDonald, Ltd. had conveyed the gas rights in Henning Tract direct to the buyer, McDonald would have received a net profit and would have been compelled to make a payment to the Bank of America in the amount of approximately \$50,000 on account of the principal of the loan of \$720,000, in addition to the annual amortization requirements. McDonald, Ltd. needed all available cash and, therefore, on December 21, 1946, in order to avoid the penalty and in preparation for the consummation of the sale, McDonald, Ltd. declared a dividend of the mineral rights in Henning Tract to Weyl as its sole stockholder. Thereupon, a deed of mineral rights bearing date December 21, 1946, was executed by McDonald, Ltd. to Weyl and was recorded January 10, 1947. Consequently, Weyl was the owner of the mineral rights in both Henning Tract and McDonald Tract and was in a position to make the conveyance to Pacific. (Ex. 9; findings T. p. 32.)

The conveyance of the mineral rights in Henning Tract by McDonald, Ltd. to Weyl pursuant to said dividend was made—as the law required (Section 115(j) Internal Revenue Code)—on the basis of the fair market value, which was ascertained to be \$230,000. This value represented the

proportionate share of the Henning Tract rights with respect to the purchase price to be paid by Pacific Oil Co. for the rights in the entire island, comprising both McDonald and Henning Tracts.

After deducting "the dividends received credit" of 85%, the balance was taxed at the normal and surtax rates amounting to \$13,110. This, together with taxes on other income, was paid by Weyl in 1947.

The portion of the sales price received by Weyl from Pacific Oil Co. for the gas rights in Henning Tract was the same amount as that used for determining the income received by Weyl as the result of the dividend. Consequently, there was no capital gain or loss in the sale of the Henning Tract gas rights to Pacific Oil Co.

Returning now to the time when the decision was reached that McDonald, Ltd. should be the borrower from the Bank and the grantor in the deed of trust, there were various business reasons leading to that conclusion, to wit:

Farming Reasons.

It was advisable to have the farming operations concentrated under single management and ownership. The two tracts—McDonald and Henning—were being farmed side by side and were separated only by a slough. Both were suitable for growing the same kinds of crops. It was far more economical to operate them as a single unit. The crop yielding the highest revenue was potatoes. However, intelligent farming requires the rotation of crops in successive seasons and planting those which enrich the soil, even though they are not lucrative. When the two tracts

were separately farmed, it was necessary to devote some portion of each to raising potatoes and also to raising soil-building crops. On the other hand, under single operation the land best suited to potatoes could be used for that purpose whether it was located on one side of the slough or the other. (T. pp. 54-57.)

Operating Reasons.

In mechanized farming the use of much equipment is essential. It is also necessary to maintain an extensive machine shop. By consolidating the farming operations in a single company, one set of equipment sufficed instead of two, and likewise one machine shop instead of two. It eliminated the necessity of transferring equipment and men from one side of the island to the other, together with the accounting procedure resulting from such exchange. Likewise, it eliminated the necessity of maintaining two complete sets of books. All this made for economy in operation. (T. p. 55.)

Financial Reasons.

In order to procure the loan from the Bank it was necessary to hypothecate both tracts of land free of encumbrances. (T. pp. 49-50.)

There were outstanding against Henning Tract reclamation bonds amounting to \$146,000, in addition to obligations evidenced by notes aggregating \$161,000. (T. p. 138.) Extensive financing could most readily be accomplished by consolidating the title in one company which, in turn, would execute a blanket deed of trust. (T. p. 58.)

Business advantages of selecting McDonald, Ltd. as the borrower.

McDonald, Ltd. had built up an advantageous excess profits base which might be of value in determining a fair rate of return on investment for tax purposes. (T. p. 65.)

McDonald, Ltd. had a favorable history with respect to potato acreage which entitled the company to a substantial allotment in the program of price support adopted by the Federal Government. (T. pp. 65-66.)

McDonald, Ltd. had a good credit rating due to the fact that it had been able to retire its bonded indebtedness and promptly meet its current obligations. On the other hand, Weyl had been in financial difficulty from time to time. (T. p. 66.)

Reasons with respect to relations with Standard Oil Company.

By reason of a running controversy with Standard Oil Company as to its obligations with respect to drilling offset wells (oral stipulation T. pp. 86-87; pp. 66-67), it was advisable to keep separate the ownership of the mineral rights in the two tracts. If a new well should be drilled on one side of the island, Standard would be obligated to drill an offset well on the other side. But if all the mineral rights in the entire island came under single ownership, this might have the effect of relieving Standard of this obligation. (T. pp. 66-67.)

The foregoing considerations were in the minds of the executives of the two companies as the basis for the decision to have McDonald, Ltd. borrow the money from the Bank of America and execute the deed of trust on both properties. To accomplish this it was necessary to convey Henning Tract to McDonald, Ltd. (T. p. 53.)

Henning Tract had never in the past been divided horizontally. Such division which had happened in the case of McDonald Tract was the result of the unusual circumstances involved in joint ownership of McDonald, Ltd. shares of stock by Holly and Weyl.

The preliminary steps leading up to the hypothecation of the land as security for the bank loan were handled on their own merits and without any thought of a sale of the mineral rights. Accordingly, it is petitioner's contention that neither the evidence nor the findings of fact made by the Tax Court authorize the inference that the transaction was sham and undertaken for the purpose of avoiding taxes.

4. The facts are undisputed. The issue concerns the inference to be drawn from the facts.

The Tax Court did not find as a fact that at the time Weyl conveyed Henning Tract to McDonald, Ltd., Weyl intended to re-acquire the mineral rights at a later date. The Tax Court reached this conclusion as an inference which it drew from undisputed facts.

Hence, we have no problem involving the power of an appellate court to review and reject a finding of fact.

The findings of the Tax Court set forth the history of Weyl's acquisition of McDonald, Ltd.: first, the joint venture with Holly Sugar Corporation, and eventually the purchase of Holly's interest.

The findings set forth the transactions by which the acquisition of Holly's interest was financed: the consolidation of the farming operations on McDonald Island in the hands of McDonald, Ltd. and the loan of \$720,000 from

the Bank of America secured by a deed of trust of the island, excepting the mineral rights.

The findings neither affirm nor deny the reasons for the selection of McDonald, Ltd. as the operating company. The testimony on this subject was not contradicted; there was no element of inconsistency in the testimony; on the contrary, it was in harmony with the facts found by the Tax Court to be true and with all other details of the transaction and the opinion concedes that "it may be true that the farming operations on McDonald Island could be more efficiently conducted if all the surface rights were in a single ownership." (T. p. 37.) But—the opinion proceeds—"the ownership of the mineral rights is completely immaterial in this connection." (id.)

The conclusive aspect of the matter is that Henning Tract was transferred to McDonald, Ltd. as part of a business transaction which was essential to provide the funds for buying out Holly's share. The Tax Court does not even intimate that there was anything sham about the conveyance insofar as it effected the transfer of the surface rights in Henning Tract. It is only the inclusion in the conveyance of the mineral rights in Henning Tract that the Tax Court has found subject to criticism.

The findings of the Tax Court also set forth the three isolated conversations on the subject of sale of the rights to Standard Oil Company. The first was in November, 1945, when Schroeder—the Standard Oil representative—proposed the unacceptable figure of \$500,000; the second in July, 1946, when Zuckerman offered to sell for \$820,000—an offer which was likewise rejected; and the third in December, 1946, when the parties reached an area of

accord. The findings demonstrate that the intervals were arid of discussion; that there was no continuous dickering; that on the contrary, the parties were so far apart as to price as to indicate the impossibility of a sale and that instead of an amicable outcome the prospect was one of litigation as to the proper allocation of the gas being withdrawn from the field.

Hence, the issue to be decided here is whether these undisputed facts authorize the inference that when Weyl conveyed Henning Tract it intended to obtain the return of the mineral rights by way of dividend and to sell them to the Standard Oil Co.

The opinion of the Tax Court states that "the question is largely one of fact". (T. p. 35.) If that were correct, we should expect a finding of fact. The absence of any such finding demonstrates that the decision of the Tax Court depends on inference, which, we respectfully contend, is not warranted by the evidence.

5. **The only so-called "circumstantial evidence" on which the Tax Court's decision rests is the fact that conveyance of the mineral rights in Henning Tract was not necessary to consummate the program of financing. This fact cannot authorize the inference that the transaction was sham.**

The issue is one of intent. It is stated in the opinion of the Tax Court as follows:

If petitioner intended from the beginning, through those who controlled its affairs, to transfer the entire Henning Tract to the subsidiary with the expectation of a re-transfer of the mineral rights, it is hardly likely that such intention would be admitted. The intention, if it did exist, would ordinarily have to be established by circumstantial evidence. (T. p. 35.)

And the Tax Court concludes:

. . . that the round-trip of the mineral rights was contemplated from the start and was lacking on bona fides. (T. p. 36.)

The Tax Court concedes (T. p. 35) that there is no direct evidence of an intent to have the mineral rights in Henning Tract make what is described as a "round-trip". But—the Court declares—there is "circumstantial evidence" of this intent.

In discussing the principles applicable to circumstantial evidence, the Court of Appeals in *Adair v. Reorganization Inv. Co.*, 125 F.2d 901 (C.C.A. 8th), said (p. 905):

If the proven facts give equal support to each of two inconsistent inferences then judgment must go against the party upon whom rests the necessity of sustaining one of these inferences. The essential inference cannot be left to conjecture and speculation. (Citations.)

In *Rider v. Griffith*, 154 F.2d 193 (C.C.P.A.), it was held (p. 197):

Proof of the fact inferred from circumstantial evidence cannot rest upon conjecture and speculation . . . We said in *Fersing v. Fast*, 121 F.2d 531, 534 . . . "suspicions cannot supply the requirements of the law."

In *Pevely Dairy Co. v. United States*, 178 F.2d 363 (C.C.A. 8th), the court, in reversing a conviction for conspiracy on the ground that there was insufficient evidence, quoted with approval from *Wesson v. United States*, 172 F.2d 931 (C.C.A. 8th), the following language (p. 370):

To sustain a finding of fact the circumstances proven must lead to the conclusion with reasonable certainty and must be of such probative force as to create the basis for a legal inference and not mere suspicion. Circumstantial evidence, even in a civil case, is not sufficient to establish a conclusion where the circumstances are merely consistent with such conclusion or where they give equal support to inconsistent conclusions. (Citations.)

Record evidence—definite and unimpeachable—provided legitimate reasons for the various transactions involved. But the Tax Court has drawn the inference that it was all make-believe; that every step in the proceeding culminating in the sale to Standard Oil was planned from the very beginning with one single accomplishment in mind—to swindle the government out of taxes. The testimony of witnesses for the petitioner provided the background for the introduction of the records. It was not incumbent on petitioner to have them protest their innocence of fraud. On the other hand, the Commissioner had ample opportunity on cross-examination to probe their intent. But not a single question was propounded in behalf of the Commissioner to elicit such evidence.

What circumstantial evidence is there of an intent “at the beginning” to initiate a sham transaction and to reacquire the mineral rights in Henning Tract?

The gist of the Tax Court’s decision is that there was no business necessity for the inclusion in the conveyance of the mineral rights in Henning Tract; in other words, that when Weyl transferred Henning Tract to McDonald, Ltd., the mineral rights should have been excepted.

This theory—we respectfully submit—is not sound in itself; and furthermore, even if it were acceptable, it would not suffice to justify the conclusion that a “round-trip” was intended.

The opinion of the Tax Court concedes that

. . . it may be true that the farming operations on McDonald Island could be more efficiently conducted if all the surface rights were in a single ownership

. . .

(T. p. 37.)

The Tax Court also recognizes:

. . . that petitioner merely employed a standard form of deed on June 27, 1946, when it transferred Henning Tract in its entirety to the subsidiary.

(T. p. 39.)

Hence, the Tax Court does not question the fact that there was—as the evidence proves beyond dispute—a sound business purpose for the transfer of Henning Tract as far as the title to the land was concerned. The Tax Court does not question the fact that a grant bargain and sale deed is the usual means of transferring title.

The reasons offered by the Tax Court¹ for rejecting the bona fides of Weyl’s deed are:

(1) That the mineral rights in Henning Tract were not necessary to the business of McDonald, Ltd., the grantee, nor to the accomplishment of the prospective financing (T. pp. 37; 39-40); and

¹The opinion of the Tax Court is addressed to the contents of the protest. Since the protest purports to state the case in brief general terms, the subject should be considered in the light of the evidence adduced at the hearing.

(2) That the same course was not followed with respect to the contemporaneous conveyance by Weyl to McDonald, Ltd. of its interest in the other side of the island—McDonald Tract;

The answer to the first ground is that in conveying Henning Tract to its subsidiary, there was no duty on the part of Weyl to consider the extent of the title which the subsidiary would need in order to consummate the loan from the Bank. There had never been a separation of surface and mineral rights in Henning Tract. There was no reason why it should have occurred to anyone to incorporate into the deed a provision carving out the mineral rights. There was no reason why the subject should have been given any consideration. There is no evidence—circumstantial or otherwise—that the subject entered the minds of those who handled the transaction.²

Furthermore, if the idea of separation had arisen, it would have been inadvisable from every common-sense business standpoint. Troublesome accounting problems would have been created. The cost of Henning Tract to Weyl was \$338,375. (findings, T. p. 30.) It would have been necessary to allocate this partly to surface and partly to mineral rights. On what basis should such an allocation be made? Why should it be made at all? Why should the idea have entered the heads of those who on behalf of Weyl decided that McDonald, Ltd. should own the prop-

²The Tax Court says: "It was therefore misleading to suggest that the proposed bank loan was a motivating factor in the transfer of the mineral rights to the subsidiary" (T. p. 38). No such suggestion was made either at the trial or in the protest. The bank loan was the motivating factor of the transfer of Henning Tract. The conveyance took the customary form.

erty and execute the deed of trust? Certainly, there was no duty on their part to complicate the transaction further. There was every sound business reason why the conveyance should be made exactly as it was made.

If the surface and mineral rights in Henning Tract had been divorced, and if the transaction should later have come under review by the taxing agencies, the Commissioner would have been the first to question the propriety of such an unusual transaction.

The fact that the deed of Henning Tract was in the usual and customary form suffices to satisfy the requirement of a business purpose as to all aspects of the deed.

Merely because it was intended to exclude the mineral rights from the deed of trust to be executed by McDonald, Ltd. to the bank does not detract from the business purpose of the deed.

Merely because the planned financing could have been accomplished by a deed covering the surface rights and excluding the mineral rights provides no reason for questioning the business purpose.

The only possible ground on which the business purpose of the deed—as to the mineral rights—can be repudiated is that on June 27, 1946, there was a present and existing plan—or at least a definite prospect—of a sale of the rights and an intention—on Weyl's part—to take back the rights when the time for a sale arrived.

There is no evidence that McDonald, Ltd. was to hold the rights only temporarily; nor that a tax-avoidance plot was hatched when the deed was executed.

There is no evidence that Weyl had any reason to believe that a sale to Standard Oil Company would be consummated.

If in November, 1945, or at any time prior to the meeting on December 12, 1946, Standard entertained any idea of paying a reasonable price for the rights, it was effectively withheld from the Weyl-McDonald, Ltd. interests. The reason for the meeting on December 12th was not to discuss a possible sale but to make one last effort to secure an equitable adjustment among the landowners in the field so as to avoid impending litigation.

Thus, there is no evidence that the idea of a prospective sale played any part in the calculations of Weyl in connection with the transfer of Henning Tract on June 27, 1946.

Surely, there was no duty on the part of Weyl's executives to look forward and consider the transaction in the light of a sale—then most unlikely—and to realize that by means of a conveyance to McDonald, Ltd. a program could be initiated which would—in the event of a sale—relieve Weyl from a capital gains tax and impose such a tax on McDonald, Ltd.

Now let us apply the test of circumstantial evidence. For this purpose we shall assume that the failure to exclude the rights could be consistent with a present intent to evade taxes by means of subsequent return of the rights and a sale thereof to Standard Oil.

But that does not meet the test. The inclusion of the rights is also explainable on the theory that in the ordinary course of business deeds take the form adopted in this instance. Hence, there are two inconsistent infer-

ences that may be drawn from the proven fact. It follows under the authorities cited above that the inference of intent to evade taxes cannot prevail. Furthermore, of the two explanations the one consistent with normal business practice is much more logical and reasonable than the far-fetched inference adopted by the Tax Court.

Hence, there is no basis for attacking the good faith of the deed because the mineral rights were not excluded.

The second ground advanced by the Tax Court involves a consideration of the history of the McDonald Tract and its former owner, McDonald Island Farms, Ltd. Holly Sugar Corporation had purchased half of the capital stock of McDonald, Ltd. Weyl had bought the other half. Holly insisted on dividends in kind. Weyl yielded under protest. First, two-thirds of the surface rights in McDonald Tract were distributed—one-third to each shareholder. Later, the mineral rights in McDonald Tract were distributed in equal shares. Zuckerman Potato Co., a partnership, bought Holly's one-third of the surface rights. Weyl bought Holly's one-half of the mineral rights.

Hence, when the time arrived to vest McDonald, Ltd. with the security to be hypothecated to the Bank, the various muniments of title were as follows:

A deed dated December 27, 1944, from Holly to Zuckerman Potato Co. of a one-third interest in the surface rights of McDonald Tract which still stood in the name of the partnership, notwithstanding that it had sold the interest to Weyl;

A deed dated August 11, 1943, from McDonald, Ltd. to Weyl of a one-third interest in the surface rights;

(The remaining one-third interest was still owned by McDonald, Ltd.)

A deed dated March 13, 1946, from McDonald, Ltd. to Weyl of a one-half interest in the mineral rights in McDonald Tract;

A deed dated June 5, 1946, from Holly to Weyl of a one-half interest in the mineral rights in McDonald Tract.

Thus, ever since the initiation of the program of dividends, the surface and mineral rights in McDonald Tract had been separated. Consequently, in vesting McDonald, Ltd. with the necessary security, the natural and reasonable course involved two conveyances only, viz.: one from Zuckerman Potato Co. of the one-third interest in the surface rights standing in its name, and one from Weyl of a one-third interest. The result of these two deeds was to vest the ownership of all the surface rights in McDonald, Ltd.

Thus, the course pursued with respect to McDonald Tract cannot furnish any criterion as to that with respect to Henning Tract. On the contrary, the same adherence to normal business routine resulted in the adoption of different forms of conveyance.

If any inference is to be drawn from the fact that Weyl did not transfer to McDonald, Ltd. the mineral rights in McDonald Tract, it is favorable to the good faith of the transaction. If Weyl envisioned the program of tax evasion of which it has been convicted by the Tax Court, it would have conveyed these rights so as to step-up their cost basis as well as those in Henning Tract. Another profitable course would have been to retain Hen-

ning Tract in its entirety and to revest McDonald, Ltd. with the title to McDonald Tract in its entirety. Then when the time arrived for the sale to Standard Oil, the McDonald Tract mineral rights could have been conveyed to Weyl as a dividend in kind. These were more valuable than those in Henning Tract. Hence, greater tax savings could in this manner have been accomplished.

It follows that there is no logical basis for the Tax Court's effort to use the method followed as to McDonald Tract for the purpose of impugning the good faith of the deed of Henning Tract.

We come now to the proposition that even if we were to concede the propriety of the Tax Court's criticism of Weyl's failure to reserve the mineral rights in McDonald Tract, this would not suffice as circumstantial evidence or otherwise to justify the conclusion that "when petitioner transferred the Henning Tract to the subsidiary it intended to recapture the mineral rights". (opinion, T. p. 39.)

6. **Even if normal business practice would have dictated a retention by Weyl of the mineral rights in Henning Tract, its failure to do so does not justify the inference that Weyl had a present intent to re-acquire those rights by means of a dividend so as to step-up the cost basis upon a sale of the rights.**

For the sake of argument, let us go along with the view of the Tax Court that the inclusion of the mineral rights in the conveyance of Henning Tract "had no business purpose" (opinion, T. p. 38) because it was unnecessary to the consummation of the bank loan.

But even that assumption—an unwarranted one—does not authorize the conclusion that there was in the mind

of Weyl's executives a present and existing intent to evade taxes by taking back the mineral rights in Henning Tract and selling them to Standard Oil.

To be sure, the case would be different if in June, 1946, Standard had made an acceptable offer for the rights and in preparation for the sale Weyl had conveyed Henning Tract to McDonald, Ltd. and then McDonald, Ltd. had promptly returned the rights to Weyl in the form of a dividend.

In that event, the case at bar would be comparable in some respects to *C. I. R. v. Transport Trading & Terminal Corporation*, 176 F.2d (C.A.2d) 570, hereafter to be analyzed.

But here there was not the slightest suggestion that at the time the financing problems were solved Standard Oil was willing to pay an acceptable price. The only offer—in November, 1945—was \$500,000. The evidence demonstrates that no one could reasonably have expected that a sale would be made. On the contrary, every indication pointed to the hopelessness of a deal. How far apart the parties were at that time is shown by the fact that the eventual price was thirty percent higher. In June 1946 the prospect was not one of sale but of controversy as to the ratable share of Henning Tract and McDonald Tract in the production of the gas field. And from that point on the situation deteriorated until in December, 1946, a lawsuit appeared imminent.³

³In its findings (T. p. 27) the Tax Court states that "There appeared to be two possible solutions" of the controversy: suit or sale. The Court overlooks the possibility of avoiding litigation by settlement of the dispute. This was never fully explored by the disputants because the sale made it unnecessary to do so.

Hence, there is no basis for the Tax Court's conclusion that the June 1946 transaction was a setting of the stage for a dividend in kind by McDonald, Ltd. to be followed by a sale of the rights to Standard Oil Co.

The Tax Court's conclusion of tax evasion cannot find any support in the finding that "Standard's offer to purchase the gas rights for \$500,000 in November of 1945 was an effort to solve the problem (the differences between Standard and Weyl) in that manner". It makes no difference why Standard was willing to buy, rather than pay royalties. The significant fact is that as of June 1946 Standard's conception as to the value of the rights was so low as to demonstrate the utter impossibility of a sale.

The Tax Court states the position of the Commissioner—which the decision approves—as follows:

The Commissioner argues that the transfer of the mineral rights to the subsidiary was not bona fide, that no business purpose was served or intended by such transfer, that the possible sale to Standard Oil was contemplated from the beginning, and that the round-trip of these rights from parent to subsidiary and back to parent again was engineered for the purpose of attempting to obtain a stepped-up basis.

(T. pp. 34-35.)

The answer is twofold: first, in June 1946 there was no "possible sale"; and second, even if Weyl had in mind that at some point of time in the indefinite future the parties might agree on a price, this was too nebulous

to provide a basis for convicting Weyl of a fraudulent scheme to avoid taxation.

What the evidence shows—and all that it shows—is that Weyl was interested in selling the rights to Standard; and that Schroeder's offer in November 1945 of \$500,000 was so low as to indicate the impossibility of a sale. That was the situation in June 1946 at the time of the conveyance of Henning Tract to McDonald, Ltd.

In July 1946 Weyl offered to sell for \$820,000. This was rejected. The Tax Court attaches "great importance" to this offer. (footnote 2, T. p. 39.) The Tax Court says:

The affirmative step thus taken by petitioner within so short a period is highly persuasive that the transfer was made with a view towards attempting to bring about a sale thereafter.

(id.)

The answer is that there is no logical connection between the offer to sell and the prior conveyance. The making of the offer cannot provide any basis for determining the purpose of the prior conveyance. All that the offer shows is a willingness to sell. To be sure, if a deal had been arranged in June 1946, or if Weyl and Standard were in an area of agreement as to price, it might be inferred that the ensuing transactions were part of a scheme to evade taxes. But a willingness or even a desire to sell is not enough to convert a legitimate and essential loan transaction into a tax fraud.⁴

⁴The footnote above mentioned (T. p. 39) charges mendacity in the protest because it referred to the approach by Pacific Oil Com-

The foregoing analysis of the evidence should demonstrate that there is nothing in the record on which to base an inference of a tax fraud and that petitioner has been unjustly convicted of this charge.

pany with an offer to buy. The Tax Court disputes this, saying that "it was petitioner's president who approached Standard."

But the Tax Court has misinterpreted the protest—possibly not without reason because it was not a model of clarity and apparently the product of an unskilled craftsman.

The conversation to which the protest referred was not the one initiated by Weyl's president in July 1946. The Pacific Oil Co. was not in the picture at that time. It first appeared in December 1946 when a reopening of negotiations led to an agreement as to price. That was the "approach" to which the protest sought to refer. According to John Zuckerman's testimony, the overture on that occasion came from Schroeder (T. p. 89). At all events, there is no basis for charging the petitioner with false representation.

The Tax Court also condemns the protest because "the initiative at this time did not come from Standard or its subsidiary, Pacific Oil Co." (footnote, T. p. 39). The catch inheres in the words "at this time". It was established beyond question that the initiative had originally come from Standard in November 1945 (findings, T. p. 29).

The "approach" by "petitioner's president" to which the Tax Court refers came later—in July 1946. As to the conversation in December, 1946, the witnesses are not in accord as to which of the two first mentioned a sale. As we have seen, John Zuckerman says it was Schroeder. Schroeder's version differs. (T. p. 157.) But the difference is immaterial. The Tax Court's charge of falsity is not based on this incident; and furthermore, the petitioner was entitled to present in its protest the recollection of its officers. The description of Pacific Oil Co. as a third party is not open to criticism. The other two parties were Weyl and McDonald, Ltd.

The author of the protest could have had no incentive to attempt to deceive the Commissioner into the belief that the offer in December 1946 was the first occasion on which a sale had been mentioned. The Commissioner would not be so naive as to accept the contents of the protest without investigation. And when the case came to trial the petitioner's witnesses were the first to provide testimony as to the previous conversations.

We respectfully submit that the Tax Court's characterization of the protest is unjustified. But certainly it would be unjust to permit this circumstance to be used as a means of developing prejudice against the petitioner or of indicating a disposition on its part to commit fraud.

There is still an additional fallacy in the Tax Court's theory. To make a case of tax evasion, the findings must justify the inference that in June 1946 Weyl had in mind and planned the entire transaction from beginning to end, including not only the sale of the rights to Standard but also the dividend in kind by McDonald, Ltd. as the step preliminary to the sale. There is nothing in the evidence or the findings to authorize such an inference. All that the evidence shows is that when the time arrived for conveyance to Standard's nominee, McDonald, Ltd. was confronted by the prospect of making a payment of \$50,000 on the principal of the bank loan, if the transfer of the Henning Tract rights should be made direct to the buyer. The whole enterprise was on thin ice; this \$50,000 could not be spared. The penalty could be avoided by means of a dividend in kind. There is not a scintilla of evidence that the idea of the dividend was considered or contemplated prior to this occasion. The decision of the Tax Court in this respect represents mere speculation.

Next we come to the implication in the Tax Court's findings that Standard had prepared separate deeds to be executed by Weyl and McDonald, Ltd., but at the direction of Weyl's counsel a different route was pursued. (findings, T. p. 32.)

If there was evidence to that effect, it would be immaterial. If there was any deviation from Schroeder's idea as to the mechanics of passing title, it was the result of the interposition of the dividend in kind. Let us assume, for the sake of argument, that Schroeder was not aware that the dividend had been declared by McDonald,

Ltd. and that all the mineral rights on the island had been consolidated in Weyl. Let us assume that Schroeder expected separate deeds, but thereafter learned that a single conveyance from Weyl would suffice. This aspect of the matter cannot lend any support to the conclusion of the Tax Court that a tax evasion was planned in June 1946.

Furthermore, the Tax Court's finding involves a gratuitous assumption. There is no doubt that the Commissioner's counsel was permitted vigorously to cross-examine his own witness, Schroeder, in an effort to elicit testimony that separate deeds had been prepared by Standard's counsel. But time and again Schroeder testified that he had no recollection as to the state of the title (T. p. 170) nor as to any distinction between the two tracts. (T. p. 172.) For a third time he reiterated his lack of recollection. (T. p. 173.) All that he could remember was that a form was submitted to Weyl's counsel, that "we proceeded then to talk about putting certain modifications in the leases" (T. p. 173); that "the papers were a grant with certain reservations" (id.); and that Weyl's counsel "wanted to go a slightly different route, wanted to submit (his) own papers". (id.)

Obviously, it was a matter of indifference to Schroeder what the form of the conveyance was; all he wanted was title to the rights. (T. pp. 171, 173.) It would have been more in keeping with the rules of evidence to procure from Schroeder the documents which Standard's attorneys had prepared. The subject was not one which could be properly explored by oral testimony. But all efforts on the part of Weyl's counsel to urge this point

were summarily rejected by the learned trial judge who even went so far as to charge Weyl's attorney with "engaging in obstructive tactics". (p. 160.)⁵

Thus, neither the findings nor the evidence provide any indication as to the content of papers prepared by Standard. Hence, no significance should be attached to the Tax Court's finding as to a "different route"; the finding has no evidentiary support.

We conclude that there is no circumstantial evidence to support the Tax Court's inference that the conveyance of Henning Tract to McDonald, Ltd. in June 1946 was the first step in an existing program to evade taxes by a subsequent dividend in kind of the mineral rights and a sale to Standard Oil Co.

7. **Other aspects mentioned by the Tax Court provide no support for the inference that an intent to evade taxes by recapturing the rights was present from the beginning.**

The Tax Court made findings (T. pp. 30-31) as to the cost to Weyl of Henning Tract, the increase of its value on Weyl's books, the fact that when Henning Tract and the two-thirds undivided interest in the surface rights of McDonald Tract were sold by Weyl to its subsidiary the price fixed was the original cost which was less than the current fair market value.

The opinion of the Tax Court does not undertake to show how these facts can provide support for the con-

⁵When Weyl's attorney sought to defend his conduct, the learned trial judge stated that his remark had been magnified "far beyond its import" and that "there was no intention at all to reflect upon you." (T. p. 164.)

clusion that the transaction was sham from the beginning. The truth is that these facts have no relevancy to the issue and can make no contribution to the solution of the controversy.

At the time of acquisition of Henning Tract, it was entered on the books of Weyl at cost. As the years passed and the value of the dollar diminished, land values accordingly increased. To reflect this an increment was recorded on the books in 1913 of \$125 per acre and another in 1926 of \$50 an acre.

But when the time came for conveyance of Henning Tract to the subsidiary, there was no reason to fix a price in excess of cost. To have done so would have violated proper accounting practice which dictates that no profit or loss should be taken on conveyance of property by a parent to a subsidiary.

In "Advanced Accounting" by E. I. Fjeld and L. W. Sherritt (The Ronald Press Company, 1946), Chapter 9, page 213, it is said:

Unrealized Profit in Fixed Assets

If sales of any type of fixed assets are made by one company to any other company in a consolidation, any unrealized profit should be eliminated, as with inventories.

Fixed Assets Sold by Parent to a Subsidiary

If a parent company sells the assets to one of its subsidiaries, the unrealized profit will remain in the parent company's surplus. Since no minority is involved, the entire profit is unrealized and must be eliminated.

And in "Advanced Accounting" by Wilbert E. Karrenrock and Harry Simons (Southwestern Publishing Company, 1949), at page 253, it is said:

Intercompany Profit on Assets Other Than Merchandise

The practices that are followed in eliminating intercompany profits on inventories are equally applicable upon the intercompany sale of properties other than inventories.

The obvious reason for this rule is that if a profit were shown, an artificial result would ensue. First, the seller would show a capital gain; second, the value on the buyer's books would be increased so as to permit a higher rate of depreciation. Both of these consequences are unrealistic in the case of two affiliated corporations.

In this connection it should also be noted that for many years Schedule D (Form 1120), issued by the Internal Revenue Service, has contained with respect to capital gains and losses the following instructions:

State with respect to each item of property reported in Schedule D (1) and (2): (1) How property was acquired; (2) whether at time of sale or exchange (a) purchaser owned directly or indirectly more than 50 percent in value of your outstanding stock, (b) where purchaser was a corporation, more than 50 percent in value of its capital stock and 50 percent in value of your capital stock was owned directly or indirectly by or for the same individual or his family, and (c) where purchaser was a corporation, whether more than 50 percent in value of its capital stock was owned directly or indirectly by you.⁶

⁶The foregoing citations were presented in petitioner's brief in the Tax Court, but are not mentioned in the opinion.

The purpose of eliciting this information is to afford the Commissioner an opportunity to investigate transfers between the parent and a subsidiary.

If it were mandatory or even permissible for a parent company to sell an appreciated asset to its subsidiary at more than cost, then it would likewise be permissible to sell a depreciated asset at less than cost. This would enable the parent to take a loss which could prove advantageous for tax purposes. It is certain that the Treasury Department would be the first to challenge such a transaction.

Hence, if any implication is intended by the Tax Court that the price at which the assets were sold to the subsidiary is evidence of bad faith, such implication must be rejected. The transfer at cost was eminently proper. In the hands of McDonald, Ltd. the original cost base of Henning Tract was preserved. This fact cannot provide support for the inference of an intent on the part of Weyl to re-vest itself with the title to Henning Tract or the surface or mineral rights therein.

This brings us to the dividend in kind declared in December, 1946, by McDonald, Ltd. to the parent company. Assuming any doubt as to the genuine business purpose of the dividend, this would be the first transaction open to criticism. But—as we shall now demonstrate—it can provide no basis for challenging the good faith of the conveyance of Henning Tract in June, 1946.

8. The business purpose of the dividend in kind in December, 1946, was clearly established. However, even if the dividend were open to question, this would not supply a basis for the conclusion of the Tax Court that the intent to recapture the Henning Tract mineral rights existed in June when Henning Tract was conveyed to McDonald, Ltd.

In a previous section we have summarized the conditions which prevailed when the time arrived for conveyance of the rights to Pacific Oil Co. Henning Tract was owned by the subsidiary—McDonald, Ltd. A conveyance of the Henning Tract mineral rights direct to Pacific would have entailed the expenditure of \$50,000 of essential capital by way of payment on account of the principal indebtedness to the bank. This was established without conflict by documents in evidence and summarized in the findings. No question could be raised as to the integrity of this dilemma. The opinion of the Tax Court does not undertake to dispute it or even discuss it.

The Tax Court has ruled that the “intermediate steps were lacking in bona fides, and must be ignored”. (T. p. 40.) The dividend in kind was one of the intermediate steps. It was dictated by business necessity.

But even if the business purpose of the dividend could be disregarded, the only inference that could be drawn is that on this occasion the idea of tax savings first came into being. But even on this assumption the transaction could not be used as a ground to question the bona fides of the conveyance of Henning Tract made six months before on June 27, 1946.

If the dividend can be ignored as a tax evasion and the transfer in December, 1946, of the Henning Tract

rights must be deemed to have been made directly by McDonald, Ltd. to Pacific Oil Company, the result would be that McDonald, Ltd. would be subject to tax on capital gain.

This is what occurred in *C. I. R. v. Transport Trading & Terminal Corporation*, 176 F.2d 570 (C.A.2d). There American-Hawaiian SS Co. sold to its subsidiary, Transport Trading & Terminal Corporation, certain securities. The sale was made in 1937 and a capital loss of \$480,000 was reported by the parent company and allowed for tax purposes.

In 1940 by reason of the war in Europe the securities had again attained their previous value. A purchaser was available. But instead of making a direct sale, the subsidiary declared a dividend in kind to its parent company, which thereupon made the sale for nearly \$600,000.

There was no legitimate reason for the dividend. It was obviously an intermediate step adopted for the sole purpose of escaping taxation. The Commissioner so held and was affirmed by the Circuit Court.

But the tax was levied on the subsidiary—not the parent. Therefore, assuming that the case at bar could be controlled by the Transport decision, it would follow that McDonald, Ltd. sold the Henning Tract gas rights to Pacific Oil Company with the result that it earned a capital gain and was subject to a tax thereon. Obviously, there would be no basis for taxing Weyl-Zuckerman & Co.

The *Transport Trading Corporation* case is not authority for the decision of the Tax Court in the case at bar.

Aside from the factual difference resulting from the business necessity of the dividend by McDonald, Ltd.—if the *Transport* case possesses any relevancy, it demonstrates that the Commissioner has taxed the wrong company here. His error cannot be rectified by means of such speculative considerations as those adopted by the Tax Court.

9. **The production by Weyl of evidence of the circumstances of the conveyance eliminated from the case the presumption in favor of the Commissioner's action.**

The Tax Court quotes from the reply brief of petitioner the following statement:

In order successfully to attack the conveyance of Henning Tract as to mineral rights, the Commissioner must show that they were included with the intent to pull them back again into the petitioner for purposes of ultimate disposition.

(T. pp. 35-36.)

The Tax Court states that in making the foregoing comment "petitioner's counsel completely misconceives the burden of proof", and the Tax Court declares:

The burden is not upon the Commissioner. The burden is upon the petitioner to overcome the correctness of the Commissioner's determination.

(T. p. 36.)

But the Tax Court fails to give any consideration to the context in the reply brief or to the principle that the production by the taxpayer of evidence material to the transaction deprives the Commissioner of the benefit of the presumption.

That is the situation at bar. That, likewise, was the subject of the comment in the brief. The evidence established that Weyl had conveyed Henning Tract to McDonald, Ltd. as a part of a transaction having a definite business objective. The question then arising was whether there was a present intent to take back the mineral rights, so as to evade taxes. It was not the obligation of the taxpayer to prove the negative side of this issue. It was the Commissioner who contended that the evasion was planned from the beginning. He had the affirmative side of the issue. Hence, it was his duty to go forward with the evidence in order to supply proof of this essential factor. As the result of the production by Weyl of material evidence, the presumption in favor of the Commissioner which was available at the outset of the trial had disappeared from the case.

In *Hemphill Schools Inc. v. C. I. R.*, 137 F.2d 961 (C.C.A.9th), the question was whether the profits of the taxpayer were permitted to accumulate beyond the reasonable needs of its business. The Commissioner held that the profits were so accumulated. On that ground he imposed a surtax under section 102 of the Revenue Code.⁷

⁷102. There shall be levied, collected, and paid for each taxable year upon the adjusted net income of every corporation . . . if such corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders or the shareholders of any other corporation, through the medium of permitting gains and profits to accumulate instead of being divided or distributed, a surtax . . . The fact that any corporation is a mere holding or investment company, or that the gains or profits are permitted to accumulate beyond the reasonable needs of the business, shall be prima facie evidence of a purpose to avoid surtax.

The Board of Tax Appeals affirmed the determination of the deficiency. The decision of the Board is described in the opinion of the Court of Appeals as follows:

The Board's holding that petitioner was availed of for the purpose of preventing the imposition of the surtax upon its shareholders through the medium of permitting gains and profits to accumulate instead of being divided or distributed appears to have been based on respondent's (Commissioner's) determination that petitioner's gains and profits were permitted to accumulate beyond the reasonable needs of its business.

(p. 963.)

But the taxpayer had produced evidence tending to show that its profits were not accumulated beyond the reasonable needs of the business. For this reason the Court of Appeals held that the presumption available to the Commissioner at the outset had disappeared and could not be weighed against the taxpayer's evidence. The Court of Appeals also held that the Board could not base its decision against the taxpayer on the ground that the taxpayer's evidence did not overcome the presumption. Accordingly, the Board's decision was reversed.

The Court of Appeals—after stating that the Board's ruling was based on the Commissioner's determination as to the unreasonable accumulation of profits—proceeded to hold:

Whether that determination was correct or incorrect was the principal, if not the sole, issue in the case. The burden of proving it incorrect rested on petitioner. Thus, if no evidence had been produced, the

Board would have had to accept the determination; for, until evidence was produced, the determination was presumed to be correct.

Evidence *was* produced. (Emphasis quoted.) Some of the evidence produced by petitioner tended to prove that its gains and profits were not permitted to accumulate beyond the reasonable needs of its business. Evidence having been so produced, *the presumption ceased*, and thenceforth the issue depended “wholly upon the evidence.” It thus became the duty of the Board to find from the evidence, and from it alone, whether petitioner’s gains and profits were permitted to accumulate beyond the reasonable needs of its business. No such finding was made. Instead, the Board, treated the presumption (*which no longer existed*) as if it were evidence, weighed it against petitioner’s evidence and concluded that petitioner’s evidence did not “overcome” it.

(pp. 963-964.)

The decision of the Court of Appeals was as follows:

Decision vacated and case remanded, with directions to (1) find from the evidence, and from it alone, whether petitioner’s gains and profits were permitted to accumulate beyond the reasonable needs of its business, such finding to be in addition to those heretofore made, and (2) thereupon enter such decision as may be proper.

(p. 964.)

In *Crude Oil Corporation of America v. C. I. R.*, 161 F.2d 809 (C.C.A.10th) the question was whether the taxpayer had in seasonable time mailed to the Collector its

election to declare a value for its capital stock under section 1202 of the Revenue Code.

The Commissioner ruled against the taxpayer. His determination was affirmed by the Tax Court.

Both sides had produced evidence at the trial in the Tax Court. It is set forth in the opinion of the Court of Appeals as follows:

The evidence in behalf of the petitioner established that the requisite return and election were enclosed in an envelope, properly addressed to the Collector's office at Oklahoma City, Oklahoma, with proper postage duly affixed thereto, and deposited in the United States mail at Tulsa, Oklahoma, in time to have been received by the Collector, in the ordinary course of mail, within the statutory filing period. The Commissioner introduced evidence as to the careful method of handling mail received by the Collector's office in Oklahoma City, from which it could have been inferred that the return and election were not received through the mail by the Collector's office.

(p. 810.)

The Tax Court failed to make any finding as to the filing of the return within the statutory period. "It merely held that the presumption of delivery was insufficient to overcome the presumption of correctness of the Commissioner's determination". (161 F.2d 810.) Hence, the Tax Court gave effect to the presumption notwithstanding the production of evidence by the taxpayer. This was held error and the cause was reversed. The Court of Appeals said:

We think the Tax Court fell into an error of law. The presumption of the correctness of the Commis-

sioner's finding is one of law. It is not an inference of fact. *It disappears when evidence, sufficient to sustain a contrary finding, has been introduced.*

* * * * *

Proof of due mailing is prima facie evidence of receipt.

It follows that the proof of regular mailing, in time to reach the Collector, in due course of mail, within the statutory filing period, was sufficient to support a finding that the return was timely filed; that the presumption of correctness attached to the Commissioner's finding vanished; and that the issue was for decision wholly on the evidence.

The cause is reversed with instructions to the Tax Court to determine the issue of fact and to give no weight to the presumption of correctness of the Commissioner's findings.

(pp. 810-811.)

These decisions control the case at bar. As the result of the production by petitioner of evidence as to the circumstances of the deed to McDonald, Ltd. the presumption of correctness of the Commissioner's determination was eliminated from the case. Thereupon it became necessary to determine the issue of intent and bad faith on the basis of the evidence. The Commissioner had the affirmative of the issue. In the absence of evidence of Weyl's intent to recapture the rights, the Commissioner could not prevail.

That was the point of the comment in petitioner's brief. The brief was not referring to the situation at the outset of the trial. It did refer to the situation at the conclusion of the evidence. The statement in the brief was correct. The Tax Court's criticism was not justified.

An interesting and pertinent discussion of the subject of burden of proof is found in 29 Taxes (The Tax Magazine) 221, by Mark Marcossan, C. P. A. He also brings up another point as to the effect of section 1112 of the Revenue Code which provides:

In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Commissioner.

Marcossan comments as follows:

An interesting situation arises when the presumption in favor of the correctness of the Commissioner's determination runs head on into other legal presumptions . . . Where fraud is asserted, the burden of proof is on the Commissioner by express provision of the Code (Section 1112). This burden is only as to the issue of fraud, and the presumption of correctness still applies to the asserted tax on which the penalty is based.

In the case at bar, the Commissioner charged and the Tax Court found petitioner guilty of bad faith (T. pp. 24, 34, 36, 38, 40) which is the equivalent of fraud.

Hence, each presumption cancelled out the other and neither was available.

The Tax Court's erroneous concept as to the presumption is inherent in its approach to the issue and has undoubtedly contributed to its erroneous determination of the cause.

10. Conclusion.

We respectfully conclude that the decision of the Tax Court should be reversed.

Dated, December 5, 1955.

Respectfully submitted,

DAVID LIVINGSTON,

Attorney for Petitioner.

**In the United States Court of Appeals
for the Ninth Circuit**

WEYL-ZUCKERMAN & COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

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FILED

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14785

WEYL-ZUCKERMAN & COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 24-40) are reported at 23 T.C. 841.

JURISDICTION

The petition for review involves a deficiency in corporate income taxes for the taxable year 1947 in the amount of \$66,082.54. (R. 41.) A notice of deficiency was mailed to taxpayer on May 22, 1952. (R. 9.) Taxpayer filed a petition for redetermination with the Tax Court on August 18, 1952 (R. 3), under the provisions of Section 272 of the Internal Revenue Code of 1939. The decision of the Tax Court was entered on February 15, 1955. (R. 4, 40-41.) This case is brought to this

Court by a petition for review filed May 11, 1955. (R. 4, 41-44.) The jurisdiction of this Court is invoked under the provisions of Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court was correct in holding that in the computation of a long-term capital gain upon the sale by taxpayer in 1947 of the gas rights (which had no cost basis to it) underlying a tract of land (known as the Henning Tract), the Commissioner properly excluded as cost basis the dividend in kind of those rights supposedly received by it from its wholly owned subsidiary at an asserted fair market value of \$230,000, on the ground that the transfer of those rights to the subsidiary in June, 1946, and their re-transfer to taxpayer in December, 1946, were without business purpose, were lacking in *bona fides* and did not result in any stepped-up basis.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113(b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * * *

(26 U.S.C. 1952 ed., Sec. 111.)

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

* * * * *

(26 U.S.C. 1952 ed., Sec. 112.)

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

* * * * *

(26 U.S.C. 1952 ed., Sec. 113.)

STATEMENT

The Commissioner of Internal Revenue determined a deficiency in the income tax of taxpayer, a California corporation, for the year 1947 in the amount of \$66,082.54 (R. 9.) That deficiency arose by virtue of the fact that in the determination of long-term capital gain from the sale of mineral and gas rights in 1947, the dividend in kind—mineral and gas rights—supposedly received by taxpayer on or about December 26, 1946,

from its wholly-owned subsidiary, McDonald Island Farms, Ltd., a California corporation, hereinafter referred to as "McDonald Ltd.", at an asserted fair market value of \$230,000 was excluded by the Commissioner as a part of the cost basis. (R. 15-18, 33.) The facts, as found by the Tax Court (R. 25-33), giving rise to that deficiency may be summarized as follows:

McDonald Island, located in the Delta Region of the San Joaquin River in San Joaquin County, California, consists of two tracts of land, Henning Tract and McDonald Tract, both used for farming. (R. 25.) The history of the acquisition of those two tracts by taxpayer and the subsequent sale of the gas rights underlying both is as follows:

The Henning Tract was acquired by taxpayer in 1912 at a cost of \$338,375. (R. 26.) Its value was written up on taxpayer's books, so that in June 1946, it was carried on the books at a value of \$811,750. However, the mineral rights in this tract had no cost basis to taxpayer. (R. 30.) On November 18, 1935, taxpayer leased the mineral rights in the Henning Tract to Standard Oil Company of California, hereinafter referred to as "Standard." (R. 26.) On June 27, 1946, taxpayer conveyed to McDonald Ltd. the entire fee of the Henning Tract, including the surface and mineral rights. This was entered on taxpayer's books as a sale for \$338,375 and a book loss of \$473,375 was written off to surplus. (R. 30.) The amounts entered on taxpayer's books as the sales price of the Henning Tract (\$338,375), and as the sale price for two-thirds of the McDonald Tract surface rights (\$226,843.22) hereinafter dealt with, were less than their fair market value on June 27, 1946. On December 21, 1946, McDonald declared a div-

dividend in kind of the mineral rights in that tract, and by deed of the same date (recorded January 10, 1947), conveyed those mineral rights to taxpayer. (R. 32.)

For many years prior to 1943, the McDonald Tract was owned by McDonald Ltd. Prior to 1931, neither taxpayer nor any of its shareholders had any interest in that concern. In 1931, three members of the Zuckerman family purchased one-half of the outstanding shares of McDonald Ltd. and Holly Sugar Corporation (hereinafter referred to as "Holly") purchased the remaining one-half interest. Later, in 1934, the Zuckermans transferred their shares to taxpayer. (R. 26.)

On November 18, 1935, McDonald Ltd. leased the mineral rights in the McDonald Tract to Standard. (R. 26.)

On August 11, 1943, McDonald Ltd. declared a dividend in kind, the subject of which was a two-thirds interest in the surface rights of the McDonald Tract. Holly and taxpayer each received a one-third interest. McDonald Ltd. retained the remaining one-third undivided interest in those surface rights and also continued to own the mineral rights in that tract. This dividend was occasioned by the fact that taxpayer and Holly disagreed both as to farming activities on the McDonald Tract and also as to fiscal matters. Taxpayers consented to the dividend on the condition that Holly give it an option to purchase for \$120,280.30 the one-third interest to be acquired by Holly as the result of the dividend; Holly executed an option agreement. (R. 26-27).

Taxpayer transferred the option to a partnership comprised of its stockholders and employees, and on December 27, 1944, the partnership exercised the op-

tion and received from Holly its one-third interest in the surface rights of the McDonald Tract. (R. 27.) On or about June 15, 1946, taxpayer purchased from the partnership its one-third interest in those surface rights, paying cash therefor. No deed was ever executed for that transfer. On June 27, 1946, taxpayer sold its two-thirds interest in those surface rights in the McDonald Tract to McDonald Ltd., and so entered the sale on its books. The conveyance with respect to one-third of the surface rights was made directly from the partnership to McDonald Ltd. by deed executed on June 27, 1946. (R. 30.)

With respect to the mineral rights in the McDonald Tract, Holly, in January 1946, and again on March 8, 1946, urged McDonald Ltd. to declare a dividend in kind thereof. Taxpayer, as the owner of 50% of the shares of McDonald Ltd., consented to the declaration of the dividend, on the condition that Holly give it an option to buy its share of the dividend. On March 13, 1946, the dividend was declared and taxpayer and Holly each received a 50% interest in the mineral rights of the McDonald Tract. At the same time, Holly gave taxpayer an option to purchase its 50% interest in the McDonald Tract mineral rights. On the same day Holly also sold to taxpayer its 50% of the capital stock of McDonald Ltd., and taxpayer thereby became owner of all of the outstanding stock of McDonald Ltd. (R. 27-28.)

On June 5, 1946, taxpayer exercised the option to purchase Holly's one-half interest in the mineral rights of the McDonald Tract and thereupon became the owner of all the mineral rights in that tract and had a cost basis for them of \$238,666.28. (R. 28.)

In the interim, at a regular meeting of the board of directors of taxpayer on May 1, 1946, a resolution was adopted authorizing its president or vice-president to endorse a promissory note of McDonald Ltd. payable to the Bank of America in the amount of \$720,000 and guarantee payment thereof. A promissory note, dated May 20, 1946, was executed by McDonald Ltd. which provided for the payment of \$720,000 in installments prior to May 20, 1956. McDonald Ltd. also executed a deed of trust, dated May 20, 1946, "on the property of the corporation commonly known as the Henning Tract and McDonald Tract located on McDonald Island * * *" to secure payment of the note. The deed, which was acknowledged on June 27, 1946, specifically excepted from its provisions "all minerals, mineral substances, mineral interests, ores, oil, gas, asphaltum and other hydrocarbons lying in or under the Henning and McDonald Tracts." (R. 28-29.)

In a letter dated June 15, 1946, to the Bank of America National Trust and Savings Association, McDonald Ltd. applied for a loan of \$720,000 "to be evidenced by a promissory note dated May 20, 1946." (R. 29.) This letter stated when payments would be made; that payment of the note was to be secured by deed of trust, and that (R. 29-30):

The undersigned hereby agrees that on or before the 1st day of April 1947, and annually thereafter, additional payments on account of principal of said loan will be made to said Bank in a sum equivalent to the difference between the minimum payment of Twenty-Eight Thousand Eight Hundred and 00/100 (\$28,800.00) Dollars as provided for in said note and 35% of the net profits of the cor-

poration for the prior fiscal year; net profits as here used shall mean profits before depreciation, but after provision for Income Taxes.

The lower left-hand corner of the letter contains the notation in writing "Accepted Julius Blum, Vice Pres. Bank of America N.T. & S.A. Stockton, Calif." (R. 30.)

Henning Tract and McDonald Tract were portions of a single gas field which also included two other properties. As gas was withdrawn from the field, Standard determined the percentage to be allocated to each of the four properties and paid royalties on that basis. Differences developed between taxpayer and Standard in connection with the apportionment of the royalties and the matter of drilling offset wells. There appeared to be two possible solutions: the purchase of the gas rights by Standard or the institution of litigation to resolve the differences. In an effort to solve the problem without litigation, Standard in November of 1945, made an offer to Maurice Zuckerman, president of taxpayer, of \$500,000 for gas rights underlying both tracts; the offer was regarded as too low and was rejected. (R. 27, 31.)

In July of 1946, Maurice Zuckerman offered to sell the gas rights in both tracts to Standard for \$875,000. Later on the same day, he indicated he would be willing to reduce the figure to \$820,000. Standard rejected the offer in August 1946. (R. 31.)

On December 12, 1946, John Zuckerman, then manager of taxpayer and president and manager of McDonald Ltd., told a representative of Standard that they did not like to sue and would like to sell their interests in the gas rights; a basis for determining a

sales price for the mineral rights in both tracts was discussed. (R. 31-32.)

On December 16, 1946, a price for the sale of gas rights underlying both the Henning and McDonald Tracts was agreed upon between representatives of Standard and taxpayer, subject to ratification by their superiors. However, prior to the consummation of the sale, the board of directors of McDonald Ltd., on December 21, 1946, adopted a resolution declaring a dividend in kind of the mineral rights in the Henning Tract. And, as stated above, by deed dated December 21, 1946 (recorded January 10, 1947), McDonald Ltd. conveyed these mineral rights to taxpayer. It was of no importance to Standard whether title to the gas rights underlying the Henning Tract was conveyed directly by McDonald Ltd., or in some other manner, and Standard had prepared papers which were intended to consummate the sale. However, taxpayer's counsel desired that the conveyance take a different route, and the route adopted—involving a transfer of mineral rights underlying the Henning Tract from McDonald Ltd. to taxpayer, followed by a conveyance of gas rights underlying both tracts from taxpayer to the buyer—was in accordance with the plan proposed by taxpayer and the papers subsequently submitted by its counsel. (R. 32.)

Standard elected to take title in the name of a subsidiary, Pacific Oil Company, and, on January 20, 1947, a deed to Pacific Oil Company of gas rights in McDonald Tract and Henning Tract, reserving oil, asphaltum, minerals and hydrocarbons other than gas, and also reserving gas rights below a specified depth, was executed and acknowledged by taxpayer. (R. 32-33.)

On taxpayer's 1946 federal income tax return it reported the receipt of a dividend of the mineral rights underlying Henning Tract at a fair market value of \$230,000, and claimed a dividend received credit. (R. 33.)

The gross sales price of the gas rights which taxpayer sold to Pacific Oil Company in January of 1947 was \$609,514.46. Of this amount, \$230,000 was allocable to the Henning Tract gas rights, and \$379,514.46 was allocable to the McDonald Tract gas rights. (R. 33.)

In its income tax return for 1947, taxpayer claimed that its basis for gain or loss on the Henning Tract gas rights was \$230,000, that the amount received therefor was \$230,000, and reported no profit on their sale. The Commissioner disallowed all of the claimed basis of \$230,000 and determined a deficiency of \$66,082.54 in taxpayer's income tax for 1947. (R. 33.) In sustaining the Commissioner's determination, the Tax Court concluded as follows (R. 40):

We are satisfied on the evidence that the course of action taken by petitioner was deliberate and calculated, without business purpose other than to establish an artificially stepped-up basis. The gas rights in the Henning Tract had a zero basis in petitioner's hands, and we hold that the planned excursion of these rights from petitioner to its subsidiary and back again to petitioner could not result in any stepped-up basis. The intermediate steps were lacking in bona fides, and must be ignored.

SUMMARY OF ARGUMENT

The various intermediate steps leading to the sale by taxpayer to Standard of the gas rights underlying

the Henning Tract at an asserted value of \$230,000 served no business purpose, were lacking in *bona fides*, and, in fact, were engineered for tax avoidance purposes.

The reasons advanced by taxpayer for the conveyance of the mineral (including gas) rights in that tract to its wholly owned subsidiary, McDonald, in June, 1946, and for the reconveyance thereof to taxpayer in December, 1946, immediately prior to the sale to Standard in January, 1947, are spurious. The alleged farming and financial reasons for the 1946 conveyance pertain only to the surface rights in that tract and the adjacent McDonald Tract, and not to the mineral rights therein. This is clearly demonstrated by the fact that the deed of trust executed to secure payment of the note, providing for repayment of a loan obtained from a bank, to finance the purchase of the fee (surface and mineral rights) in the Henning Tract and two-thirds of the surface rights in the McDonald Tract, specifically excepted from the security all mineral rights in both tracts. Moreover, although taxpayer sold the mineral rights (which had no cost basis to it) in the Henning Tract, it retained the mineral rights in the McDonald Tract which did have a ²⁴⁹⁶ ~~cash~~ basis. Again, the sales price to the subsidiary for the Henning Tract, as well as of taxpayer's interest in the McDonald surface rights, was less than their fair market value in June, 1946.

Similarly, the alleged business purpose for the dividend in kind to taxpayer in December, 1946, of the mineral rights in the Henning Tract, namely, to avoid an increase in the amount of the repayment of the loan to the bank which would result if McDonald sold those

rights directly to Standard, is also without merit. In the contingency mentioned, McDonald would have received ample funds with which to meet its obligation.

On the other hand, taxpayer was aware, as early as November, 1945, that Standard was interested in purchasing the gas rights underlying both tracts as one means of settling the controversy which existed with respect to the drilling of offset wells and the payment of royalties under the existing leases of the gas rights in those tracts to Standard. All the intermediate steps taken to secure a stepped-up basis for the gas rights in the Henning Tract, point to the fact that they were pursued only for tax avoidance purposes.

ARGUMENT

The Tax Court Was Correct in Holding That the Transfer of the Mineral Rights in the Henning Tract From Taxpayer to Its Wholly Owned Subsidiary and Back Again to It Was Lacking in *Bona Fides* and Did Not Result in Any Stepped-Up Basis

By June 27, 1946, taxpayer owned the mineral rights in both the Henning and McDonald Tracts. It also owned the surface rights in the Henning Tract and two-thirds of the surface rights in the McDonald Tract—the remaining one-third of the surface rights being owned by McDonald. In addition, taxpayer owned all of McDonald's outstanding stock. By that time (in fact, as early as November, 1945) taxpayer knew that Standard was sufficiently interested in the gas rights in both tracts to have offered a half million dollars for them.

On June 27, 1946, taxpayer transferred to its wholly owned subsidiary, McDonald Ltd. all surface rights in the Henning Tract and two-thirds of the surface rights

in McDonald Tract, thus giving to the subsidiary all surface rights in both tracts. The transfer also included all mineral rights (which had no cost basis to taxpayer) in the Henning Tract. Taxpayer retained all mineral rights in the McDonald Tract. By deed, dated December 21, 1946, McDonald reconveyed to taxpayer all mineral rights in the Henning Tract pursuant to a resolution of the board of directors of the subsidiary declaring a dividend in kind of these mineral rights. Thereafter, by deed dated January 20, 1947, taxpayer conveyed a portion of those rights in both tracts to a wholly owned subsidiary of the Standard Oil Company.

The deed from McDonald to taxpayer purported to effect a distribution of a dividend in kind to taxpayer, Weyl, of all mineral rights in the Henning Tract.¹ Taxpayer reported the receipt of that "dividend" on its 1946 income tax return at a value of \$230,000, and claimed a dividend received credit. (Ex. 1 A.)² Al-

¹ A statement attached to Form O (Oil and Gas Depletion Data), accompanying the 1946 return (Ex. 1-A) explains this transaction:

The other cost in the amount of \$230,000.00 represents the fair market value of gas rights received as a dividend from McDonald Island Farms, Ltd. The allocation of the agreed sales price of the gas rights to Standard Oil Company of California in 1947 was considered to be the fair market value at December 21, 1946.

Although taxpayer designated entire record to be printed, the exhibits do not appear in the printed record.

² As the Tax Court pointed out (R. 35, fn. 1), on taxpayer's theory, the re-transfer of these rights to it by the subsidiary would result in taxpayer receiving a taxable dividend in the amount of \$230,000. However, under the provisions of Section 26(b) of the 1939 Code, 85% of that dividend is received tax free. In substance, therefore, the tax advantage to taxpayer would be that it would be chargeable with the dividend income in the amount of only 15% of \$230,000, while the entire gain of \$230,000 upon the sale of the gas rights to Standard would be tax free.

though those gas rights had a zero basis in its hands for a number of years, it is taxpayer's contention that by reason of the conveyance to the subsidiary and reconveyance some six months later as a "dividend," these rights acquired a stepped-up basis equal to \$230,000, with the result that it realized no gain upon the consummation of the sale of a portion thereof to Standard in 1947.³ It is the position of the Commissioner, in which the Tax Court concurred that the transfer of the mineral rights to the subsidiary was not *bona fide*; that no business purpose was served or intended by such transfer; that the possible sale to Standard Oil was contemplated from the beginning; and that the round-trip of those rights from parent to subsidiary and back to parent again was engineered for the purpose of attempting to obtain a stepped-up basis. Accordingly, in determining the long-term capital gain from the sale of mineral rights in 1947, the Commissioner and the Tax Court refused to consider the asserted fair market value of \$230,000 for the mineral right in the Henning Tract as a part of the cost basis. (R. 18.)

Whether or not the Commissioner was justified in his

³ Taxpayer's 1946 and 1947 returns (Exs. 1-A and 2-B) make it appear that the Henning mineral rights received as a dividend and those sold to Standard were identical and had a \$230,000 value. It is clear from Petitioner's Exhibit 9 and Respondent's Exhibit G, however, that taxpayer retained substantial mineral rights in the Henning Tract, conveying only the gas rights which the Tax Court found (R. 34) had a value at the time of sale of \$230,000. Of course, no adjustment to 1946 income was made in the deficiency notice (R. 15-16) to reflect the value of these retained rights, since under the Commissioner's view of the entire transaction there was no 1946 income from receipt of the mineral rights, but, under taxpayer's view the value of the retained rights should have been included in the value of the dividends received by it.

action depends upon whether the dividend in kind declared by the subsidiary in December 1946, was a *bona fide* dividend. That, in turn, depends upon whether the transfer of the mineral rights to the subsidiary was made with a *bona fide* business purpose or whether it so lacked business purpose that it should be disregarded. The question is essentially one of fact and in determining the incidence of taxation with respect to the transaction it is necessary to look through the form and ascertain its substance. *Commissioner v. Court Holding Co.*, 328 U.S. 331; *Griffiths v. Commissioner*, 308 U.S. 355; *Higgins v. Smith*, 308 U.S. 473; *Gregory v. Helvering*, 293 U.S. 465. That being so, the findings and conclusions of the Tax Court herein sustaining the Commissioner's determination should not be disturbed unless "clearly erroneous," due regard being had for the opportunity of the trial court to judge the credibility of witnesses. *United States v. Gypsum Co.*, 333 U.S. 364, 394-395, rehearing denied, 333 U.S. 869; *Gillette's Estate v. Commissioner*, 182 F. 2d 1010, 1014 (C.A. 9th); *Grace Bros. v. Commissioner*, 173 F. 2d 170, 173 (C.A. 9th); Rule 52(a), Federal Rules of Civil Procedure.

At the outset, we note that, as below, taxpayer misconceives the nature of the case and the onus of the burden of proof, for it speaks of having been "convicted" of a "tax fraud" (Br. 29-30, 45), and of the Commissioner's having the "affirmative" of establishing its intent to recapture the mineral rights from McDonald so as to evade taxes, inasmuch as taxpayer had allegedly introduced evidence attempting to rebut the presumption of the correctness of the Commissioner's determination (Br. 39-45). This case, of course,

relates to civil, not criminal, tax liability, and does not involve the issue of fraud and the imposition of any fraud penalties; hence the provisions of Section 1112 of the 1939 Code, cited by taxpayer (Br. 45), are not pertinent. This case involves simply an understatement of taxable income, and as the Tax Court observed (R. 36), the burden is not upon the Commissioner, but rather upon the taxpayer to overcome the correctness of the Commissioner's determination. *Welch v. Helvering*, 290 U.S. 111, 115; *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220, 225 (C.A. 9th); *Buck v. Commissioner*, 83 F. 2d 786, 788 (C.A. 9th).

In an attempt to establish a business purpose for the transfer of the mineral rights in the Henning Tract and their recapture from the McDonald prior to their sale to Standard, taxpayer relies principally upon certain so-called "farming" and "financial" reasons. (Br. 12-13; R. 55.) These reasons were succinctly set forth in a written protest (Resp. Ex. E; R. 36-37) filed by taxpayer against the proposed deficiency which stated in material part (p. 3) that—

The transfer was made so that all the McDonald Island property would be owned by one company and thereby lend itself to a more efficient conduct of farming operations. Also, all the land could then be pledged as collateral to a trust deed note with a bank. * * *

Those reasons were repeated and embellished in the testimony before the Tax Court (R. 38, 49-50, 54-58), and are also relied upon by taxpayer on brief herein (pp. 12-13). The Tax Court concluded (R. 37) that both reasons were "spurious" in that they related to

surface rights rather than the *mineral* rights in question.

Thus it pointed out (R. 37) that, while it may have been true that farming operations on McDonald Island could have been more efficiently conducted if all surface rights were in a single ownership, the ownership of the mineral rights was completely irrelevant in that respect. Further evidence of this point is found in the fact that when, on June 27, 1946, taxpayer transferred to McDonald, its subsidiary, the Henning Tract (Pet. Ex. 10), and its two-thirds interest in the surface rights in the McDonald Tract, it retained and did not transfer to the subsidiary the mineral rights in the McDonald Tract (Pet. Exs. 6 and 7). Again, when at a meeting of the Board of Directors of McDonald on December 21, 1946, it declared a dividend of the mineral rights underlying the Henning Tract to taxpayer, its parent company, the resolution adopted expressly recited that "none of the rights * * * are necessary for the operation of the business of this corporation and may be distributed to the stockholder thereof by way of a dividend in kind." (Pet. Ex. 8.) As the Tax Court commented (R. 37), it is quite plain that these mineral rights were no more necessary to the business of the subsidiary on June 27, 1946, when they were first transferred by taxpayer as part of the entire Henning Tract. Moreover, since, as taxpayer admits (Br. 5), both tracts "had been farmed extensively year after year under separate ownership", the alleged farming and operating reasons pale into insignificance for that reason also.

Taxpayer also attempts to explain this re-transfer of the Henning Tract mineral rights as having been "dic-

tated by business necessity." (Br. 37.) The allusion is to the alleged "financial" reasons,⁴ mentioned in the protest, pertaining to the pledge of the land as collateral for a bank loan. Taxpayer argues (Br. 16), that the Henning Tract was transferred to McDonald as part of a business transaction which was essential to provide the funds "for buying out Holly's share".⁵ With respect to this loan and the security therefor, the Tax Court found (R. 28-29) that, pursuant to authority of taxpayer's board of directors granted on May 1, 1946 (at which time taxpayer owned all the outstanding stock of McDonald), a promissory note, dated May 20, 1946, was executed by McDonald. The note provided

⁴ Taxpayer also attempts to supply a business reason for the transfer of the Henning Tract by listing (Br. 14) certain alleged business advantages of selecting McDonald as the borrower, namely, an advantageous excess profits base, a right to a substantial potato acreage in the Government's price support program, and a good credit rating. These reasons, even if valid with respect to obtaining the loan, nevertheless only relate to the surface rights, since, as developed below, the mineral rights were excluded from the loan security.

⁵ The price paid for that stock, on the occasion of its acquisition on March 13, 1946, was \$216,620, and taxpayer apparently borrowed that sum from the Bank of America. (R. 48.) Almost immediately thereafter, John Zuckerman began negotiating further with the bank for a loan of \$720,000 in order to purchase from taxpayer the Henning Tract (surface rights—\$338,375), two-thirds of the surface rights in the McDonald Tract (\$240,000), and to provide for the acquisition of Holly's 50% share of the McDonald Tract mineral rights. Taxpayer used the payments received by it from McDonald to repay the bank the sum of \$216,620 borrowed to purchase Holly's share of the McDonald stock, and also to pay for the mineral rights acquired from Holly. (R. 48-49, 57-58, 137-138.) Thus, even though McDonald was the "borrower", it appears that the principal reason for and net result of the loan was to give taxpayer effective control over the mineral rights in both tracts.

for the payment of \$720,000 in installments prior to May 20, 1956. At the same time, McDonald also executed a deed of trust "on the property of the corporation commonly known as the Henning Tract and McDonald Tract located on McDonald Island * * *" to secure payment of the note. The deed, which was acknowledged on June 27, 1946 (the date of the transfers by taxpayer to McDonald), specifically excepted from its provisions "All minerals, mineral substances, mineral interests, ores, oil, gas, asphaltum and other hydrocarbons lying in or under the Henning and McDonald Tracts." (R. 29.) Rejecting taxpayer's argument that the circumstances pertaining to this loan constituted a business reason for the transfer of the mineral rights by taxpayer, the Tax Court stated (R. 37-38), that the evidence showed that the loan in question had already been negotiated, and that it was to be secured by a deed of trust with respect to the entire island, excluding, however, all mineral rights. Consequently, as the Tax Court in effect concluded (R. 38), the proposed bank loan was not a motivating factor in the transfer of the *mineral* rights to the subsidiary. It related only to the *surface* rights in the two tracts. Contrary to taxpayer's contention (Br. 8, 22, 23-24), the fact that the deed (Pet. Ex. 10) conveying the Henning Tract may have been in the usual and customary form does not serve to establish a business purpose for the transfer, for on the very same day, June 27, 1946, the deed (Pet. Ex. 7) of its interest in the McDonald Tract to the same subsidiary expressly excluded the mineral rights, and, as pointed out above, the deed of trust (Pet. Ex. 3) securing the bank loan expressly excluded the mineral rights under the very (Henning) tract involved herein.

Pursuing this "financial" reason, taxpayer argues further (Br. 3, 9, 11, 31) that rather than showing a preconceived plan to declare a dividend in kind of the mineral rights in the Henning Tract, as a preliminary step in the sale to Standard, the evidence merely shows that when the time for the conveyance arrived, McDonald was confronted with the prospect of making a payment of \$50,000 on the principal of the bank loan⁶ in the event that it should transfer those rights directly to the buyer (Standard), and that the \$50,000 could not be spared. In other words, taxpayer seeks to have accepted as a business reason for the reconveyance to it of the Henning Tract mineral rights, prior to their conveyance to Standard, an alleged desire to switch the profit from their sale from McDonald so that the latter could evade its contractual obligation to the Bank of America. Even if successful, McDonald could not profit in the long run by such a maneuver for it was obligated to repay the full \$720,000 loan. And, in any event, the argument is specious for had McDonald made the sale directly, it would have received the \$230,000 and thus would have had ample funds with which to honestly meet its obligations.

Further evidence that this particular reason was not *bona fide* but merely imaginary, is found in the fact that in 1950 taxpayer was contending that the reconveyance to it was made because of the insistence of the buyer, Standard's nominee, Pacific Oil Company. This is apparent from the protest against the proposed

⁶ Under the terms of the bank loan (Pet. Ex. 4), McDonald agreed to make payments on the principal of the loan equal to 35% of the corporation's net profits after taxes less \$28,800.00. (See also R. 95-96.)

deficiency (Resp. Ex. E) wherein taxpayer states (p. 3-4) :

The third party, Pacific Oil Company, was interested only in the purchase of all the known mineral rights on the island as a whole * * *.

McDonald Island Farms, Ltd. therefore declared as a dividend all the known mineral rights it owned so that the sale could be consummated by the parent company.⁷

Moreover, it was admitted that the mineral rights could have been transferred to Standard by two deeds rather than one, and George Schroeder, who negotiated the transaction for Standard testified (R. 171), and the Tax Court found (R. 32), that it was of no consequence to the latter what route the conveyances took, whether directly by McDonald, or in some other manner, as long as Standard was the ultimate grantee. As far as the purchaser was concerned, therefore, there was no necessity for the reconveyance of the mineral rights by McDonald to taxpayer.⁸

As an additional reason, supporting a business purpose, taxpayer argues (Br. 9-10, 14) that by reason of the controversy with Standard as to its obligation with respect to drilling offset wells "it was advisable to keep separate the ownership of the mineral rights in the

⁷ See also to same effect a statement of a representative of taxpayer at a conference held in the San Francisco office of the Internal Revenue Agent in charge on March 17, 1950 (R. 188-189, 192), and testimony of John Zuckerman (R. 94) in answer to the reasons for the declaration of the dividend of the Henning Tract mineral rights in December, 1946.

⁸ There is some indication that Standard had prepared papers to effect separate conveyances from taxpayer and McDonald. (R. 32, 170-174.)

two tracts," since if all mineral rights in the entire island were under single ownership, it might have the effect of relieving Standard of the obligation of drilling offset wells. This argument is predicated on the vague testimony of a witness, John Zuckerman (R. 66-67, 86-87), which falls short of establishing that it actually constituted a reason, in the minds of taxpayer's officers, for separating ownership of the mineral rights in the two tracts. In any event, the argument is without merit since it fails to explain just how offset wells would be economically advantageous between tracts which are owned by one economic interest, namely, taxpayer and its wholly owned subsidiary, McDonald. Where adjacent gas tracts are owned by different economic interests, it is understandable that offset wells may be employed to prevent one owner from taking more than its share, but such is not the situation here.

From the foregoing, it is clear that taxpayer has advanced no sound business reason to account for the conveyance of the mineral rights in June, 1946, and their reconveyance in the form of a dividend in December, 1946, immediately prior to the consummation of the sale to Standard.

It is the position of the Commissioner, in which the Tax Court concurred, that viewing the overall transaction, the ultimate sale of the gas rights must have been anticipated by taxpayer's president, Maurice Zuckerman, prior to June 27, 1946, and that no sound business purpose existed for the transfer and re-transfer of the Henning Tract mineral rights other than to reduce income taxes on the ultimate sale.

It must be remembered, as the Tax Court pointed out (R. 27, 38), that taxpayer was experiencing difficulty

with Standard in connection with the latter's leases of the gas rights, and that one way of settling the dispute was to have Standard purchase the rights. Toward that end, Standard made an offer of \$500,000 for the gas rights under the entire island in November, 1945. Although the offer was rejected as being too low, at least it served to inform taxpayer's president, Maurice Zuckerman, that Standard was willing to resolve the difficulties by purchase of the gas rights. At that time, although taxpayer owned the entire fee in the Henning Tract, it owned only one-third of the surface rights in the McDonald Tract, and, by virtue of its ownership of 50% of the stock of McDonald, it had a one-half interest in the mineral rights underlying the McDonald Tract. By June 26, 1946, however, a series of transactions had taken place as a result of which it not only retained entire ownership of the Henning Tract, but also owned all the mineral rights in the McDonald Tract, two-thirds of the surface rights in that tract (the other one-third being owned by McDonald), and all the McDonald stock. It thus had complete control over both tracts and was in a position to control and handle the possible settlement of the difficulties with Standard by sale on its own terms. See *Bank of America National Trust & Savings Assn. v. Commissioner*, 15 T.C. 544, 555, affirmed *per curiam*, 193 F. 2d 178 (C.A. 9th). That it envisaged such a sale and the tax consequences thereof by June 26, 1946, when it conveyed the entire fee in the Henning Tract to McDonald, is evidenced by several factors. First, although that tract had cost taxpayer \$338,375, when it first acquired it in 1912, it had a book value of \$811,750 in June, 1946. (The mineral rights had no cost basis to taxpayer since the presence of gas was not

indicated until 1935 or brought into production until 1937.) Nevertheless, when it conveyed the entire fee of the Henning Tract, including both the surface and mineral rights, to McDonald on June 27, 1946, it entered the transaction on its books as a sale for \$338,375, and a book loss of \$473,375 was written off to surplus. However, the amounts entered on its books as the sale price (\$338,375), as well as the sale price for two-thirds of the McDonald Tract surface rights (\$226,843.22), were less than their fair market value on June 27, 1946 (R. 26, 30-31, 34.) Regardless of what proper accounting and bookkeeping procedure might require in the case of a sale of an asset by a parent to its subsidiary at more than cost (Br. 33-36), that certainly did not prevent a sale of the Henning Tract mineral rights at their market value.

Secondly, although taxpayer conveyed the mineral rights in the Henning Tract which had no cost basis to it, to McDonald, it retained the mineral rights in McDonald Tract which had a cost basis to it of \$238,666.28. (R. 28.) That the transfer of the former rights was a conscious act rather than an incidental by-product of the conveyance of the surface rights, is conclusively shown by the deed of trust, dated May 20, 1946, and acknowledged June 27, 1946, in which the surface rights in both tracts were conveyed to the trustee, but with the mineral rights specifically excluded. Moreover, although taxpayer had in form sold the mineral rights in the Henning Tract, it had done so in such a way that title was in a wholly owned subsidiary from which it could reacquire title at any time it might decide to sell those rights, and the deed of trust had been drafted so as not to interpose any obstacle to such a sale. Obviously

since taxpayer had a cost basis for the McDonald Tract mineral rights, it had no "tax evasion" reason (Br. 25) for conveying them to McDonald at the time it conveyed the Henning mineral rights.

Thirdly, further evidence that taxpayers' officers contemplated the ultimate sale of the Henning Tract mineral rights to Standard at the time of their conveyance to McDonald in June, 1946, exists in the fact, also pointed out by the Tax Court (R. 38-39), that promptly thereafter, in July, 1946, taxpayer's president Maurice Zuckerman went to the offices of Standard and offered to sell the gas rights underlying both tracts for some \$800,000 (R. 152). Schroeder, Standard's representative testified (R. 153) that there were further discussions in August, 1946, apparently about a possible law suit, the effect of which probably also facilitated the ultimate sale (R. 153-157).

Finally, when the sale to Standard was arranged, taxpayer reacquired title to the Henning mineral rights prior to making the conveyance to the buyer, although, as pointed out above, the alleged dividend served no business purpose; the conveyance of the rights could have been made by deed from McDonald, and it was of no consequence to Standard what route the conveyances took.⁹ Under the circumstances, the "dividend" can only be considered as a distribution to escape a tax. *Commissioner v. Transport Trad. & Term. Corp.*, 176 F. 2d 570, 572 (C.A. 2d), affirmed *per curiam*, 338 U.S.

⁹ The fact that the "dividend" was disregarded for purposes of determining taxpayer's gain on the ultimate sale, does not mean that the sale of those rights must be deemed to have been made by McDonald so as to subject it to a tax thereon, as taxpayer argues. (Br. 4-5, 37-38.) The fact is that the original conveyance was part of the sham and is also disregarded, so that the ultimate conveyance to Standard was made by taxpayer.

955, rehearing denied, 339 U.S. 916. At the time of their reacquisition, a portion of those rights had a fair market value of \$230,000 constituting that portion of the gross sales price of the gas rights sold to the ultimate buyer, Pacific Oil Company, in January, 1947, allocable to the Henning Tract gas rights.

As a consequence of this tax avoidance scheme, taxpayer understated its 1947 income from the sale of the Henning Tract gas rights in the amount of \$230,000 with a resultant tax deficiency of some \$66,000. (R. 18-19.) That the Commissioner correctly determined this deficiency by disregarding the "dividend" as a sham is readily apparent from viewing the transaction as a whole. The *bona fides* or substance of the dividend in kind in December 1946, is not an isolated factor; its substance depends upon the substance of the subsidiary's ownership of the mineral rights and that in turn is related to the substance of the conveyance of the mineral rights in June, 1946. The latter, in turn, depends upon whether there was a *bona fide* business reason for the conveyance. As the Supreme Court said in *Commissioner v. Court Holding Co.*, *supra*, p. 334:

The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant.

We submit, that on the evidence as a whole the possible sale to Standard was contemplated from the begin-

ning, and that the Tax Court correctly concluded (R. 40) that the intermediate steps were lacking in *bona fides* and had to be ignored.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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JANUARY, 1956.

No. 14,785

United States Court of Appeals
For the Ninth Circuit

WEYL-ZUCKERMAN & COMPANY,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF OF PETITIONER.

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United States Court of Appeals For the Ninth Circuit

WEYL-ZUCKERMAN & COMPANY,	}
<i>Petitioner,</i>	
VS.	
COMMISSIONER OF INTERNAL REVENUE,	}
<i>Respondent.</i>	

REPLY BRIEF OF PETITIONER.

1. The Commissioner's statement of the question assumes the validity of his contention as to the issue to be decided in this case.

In stating the question the Commissioner's brief refers to the sale of the gas rights in 1947 by Weyl to Pacific Oil Company. With respect to these rights the Commissioner's brief (p. 2) states "which had no cost basis to" Weyl.

Whether or not the gas rights had a substantial cost basis is the very issue to be decided in this case. If Weyl is correct in its contention that the deed executed by it in June, 1946 was a bona fide transaction, then the cost basis of the gas rights to Weyl was \$230,000.

In the Commissioner's statement of the question (br. p. 2) he repeats this assumption in his own favor with

respect to the issue to be decided. The Commissioner says that the gas rights were “supposedly received by” Weyl from McDonald, Ltd., its subsidiary. (br. p. 2.)

This is likewise the case with respect to the “Statement” in the Commissioner’s brief (p. 3) where he uses the same language, viz.: “supposedly received” with respect to the mineral rights.

The answer is that if the deed of June, 1946 was a bona fide transaction, it follows that by means of the subsequent dividend in kind from McDonald, Ltd. to Weyl, declared on December 21, 1946, the mineral rights were actually and not “supposedly” received.

2. **No question is presented in the case at bar as to the proper interpretation of the provisions of the Internal Revenue Code with respect to determination of the amount of gain.**

The Commissioner’s brief (pp. 2-3) quotes from Sections 111, 112 and 113 of the Internal Revenue Code asserting that these are the statutes involved in the case. We do not question or criticize the propriety of these quotations. But the issues to be decided do not involve the meaning of the code sections. And we mention the point only for the purpose of rebutting any possible implication that the provisions of the code should have been set forth in our opening brief.

There is no dispute here as to the factors involved in calculating gain in the abstract. The only controversy is whether the deed of Henning Tract from Weyl to McDonald, Ltd. can be ignored as a device to avoid taxes. Hence, the outcome of this case depends on the good faith of the conveyance and not on the meaning of the provi-

sions of the Revenue Code for determination of gain or loss.

3. The Commissioner's brief fails to answer the proposition that as the result of the production by Weyl of evidence, the presumption in favor of the Commissioner disappeared from the case.

The production of evidence by the petitioner eliminated from the case the presumption in favor of the Commissioner's action.

This point was argued at pages 40-44 of the opening brief and authorities cited in support. The Commissioner ignores them.

He cites without comment (br. p. 16) *San Joaquin Brick Co. v. C. I. R.*, 130 Fed. (2d) 220, 225 (C.A. 9th). On reading this case we find that it stands for the same proposition as the later one cited in our opening brief, also decided by this Court (*Hemphill Schools, Inc. v. C. I. R.*, 137 Fed. (2d) 961). The essential portions of the opinion in the *San Joaquin Brick* case are set forth in the appendix to this brief. The case squarely holds that as the result of the production of relevant evidence by the taxpayer, the presumption in favor of the Commissioner disappears.

This point is so well settled that it is unnecessary to discuss other cases cited—likewise without comment—at page 16 of the Commissioner's brief in an effort to convince this Court that the presumption continues to exist.

The Commissioner discusses an additional contention advanced in our opening brief, viz.: that the presumption in favor of the Commissioner is neutralized by the fact

that the Commissioner is charging Weyl with fraud. The Commissioner's brief denies that any charge of fraud is involved. There is no need to labor the point. Even if we accept the Commissioner's assertion, the first ground above noted is adequate to settle the point.

4. **The fact that the business purpose of the deed to Henning Tract could have been accomplished without inclusion of the mineral rights cannot support the decision against the bona fides of the deed.**

The Tax Court concedes that the deed of Henning Tract from Weyl to McDonald, Ltd., had a business purpose in so far as the surface rights were concerned. This is discussed at page 20 of our opening brief.

But the Tax Court decided that it was unnecessary for Weyl to include the mineral rights in the deed and therefore, as to the mineral rights, the transaction was spurious.

In our opening brief we pointed out that the customary mode of transferring property is by deed conveying the entire fee; that there had never been any differentiation between surface and mineral rights in Henning Tract; that there was no reason why it should occur to Weyl's officers that the property should be divided horizontally; that there is no evidence that the subject ever entered their minds; and that if any thought had been given to the subject, the accounting problems would have been so difficult of solution as to discourage the idea. (Op. br. pp. 20-22.)

The Commissioner's brief merely repeats the Tax Court's theory that the business reasons established at

the trial for the conveyance of Henning Tract “related to the *surface* rights rather than the *mineral* rights in question.” (br. pp. 16-17; italics quoted.)

This theory has been answered in our opening brief (Sec. 5, pp. 17-26) and needs no further comment.

The Commissioner’s brief—going beyond the theory adopted by the Tax Court—attacks the transfer to McDonald, Ltd. in all of its aspects. The Commissioner asserts (footnote 5, br. p. 18) that “the principal reason and net result of the loan” from the Bank of America was “to give taxpayer effective control over the mineral rights in both tracts.”

The answer is that the new financing was needed not only to pay for Holly’s share of the mineral rights but also for Holly’s other interests.

The Commissioner also questions the necessity of maintaining separation of ownership of mineral rights in the two tracts. This subject is discussed at pages 14-15 of the opening brief. The Commissioner says that we have failed

. . . to explain just how offset wells would be economically advantageous between tracts which are owned by one economic interest, namely, taxpayer and its wholly owned subsidiary, McDonald. (br. p. 22.)

The answer is that the leases to Standard Oil were separate; that the rights accorded to each lessor as to offset wells were fixed and were not cancelled as the result of the acquisition by one lessor of the capital stock of the other. New wells would obviously increase the production

attributable to both Weyl and McDonald, Ltd. as compared to that of other owners in the field.

5. The Commissioner's brief incorrectly describes the transaction in which Weyl transferred Henning Tract to McDonald, Ltd.

As found by the Tax Court, the transfer of Henning Tract by Weyl to McDonald, Ltd. was accomplished by deed which conveyed the entire fee (T. p. 30). The deed is in evidence (Ex. 10).

By means of two separate instruments the two-thirds of the surface rights in McDonald Tract (then owned by Weyl) were also conveyed to McDonald, Ltd. (T. p. 30).

At the outset of the portion of the Commissioner's brief entitled "Argument" he attempts to distort these transactions. He asserts (br. pp. 12-13):

On June 27, 1946, taxpayer transferred to its wholly owned subsidiary, McDonald Ltd. all surface rights in the Henning Tract and two-thirds of the surface rights in McDonald Tract, thus giving to the subsidiary all surface rights in both tracts. The transfer also included all mineral rights (which had no cost basis to taxpayer) in the Henning Tract.

This statement seeks to create the impression that the transfer of the surface rights in both tracts was accomplished by a single document and that the conveyance contained additional words of transfer specifically referring to the mineral rights in Henning Tract.

The statement is erroneous and misleading. It is in keeping with the Commissioner's attempt to misconstrue

the ordinary and usual characteristics of a deed—to induce the Court to regard it as having a dual purpose.

This is the fallacy which pervades the entire argument by means of which the Commissioner seeks to attack the good faith of the transaction. The same fallacy also appears in the Commissioner's brief where he purports to summarize Weyl's proprietary interest in the two tracts. There the Commissioner asserts:

By June 27, 1946, taxpayer owned the mineral rights in both the Henning and McDonald Tracts. It also owned the surface rights in the Henning Tract and two-thirds of the surface rights in the McDonald Tract—the remaining one-third of the surface rights being owned by McDonald. . . . (br. p. 12).

The foregoing language would convey the impression that Weyl's title to the surface rights and mineral rights in Henning Tract was derived from different sources and evidenced by different muniments. Of course, this is not the case. On the other hand, this was the situation with respect to Weyl's interest in the McDonald Tract. The mineral rights in McDonald Tract had been acquired through two distinct transactions. The two-thirds of the surface rights in McDonald Tract had been acquired by Weyl through two other transactions.

Throughout the Commissioner's brief we find a continuous effort to divide Weyl's ownership of Henning Tract into surface and subsurface rights. The Commissioner's obvious purpose is to create an atmosphere which will assist his contention that on June 27, 1946, Weyl's business purpose did not justify the execution of a deed of Henning Tract to McDonald, Ltd. and that to accom-

plish that purpose Weyl should have carved out the mineral rights and retained them.

The same fallacy appears in the Commissioner's frequent assertion that the mineral rights in Henning Tract had "no cost basis" (br. p. 13) or a zero basis (br. p. 14). The concept of a separate cost basis for the mineral rights could only arise when they were separated from the surface rights. Prior to such separation the asset was a single one—the land with all its contents. The cost basis was \$338,375 (findings, T. p. 30). This cannot be split up and allocated part to surface and part to mineral rights.

It makes no difference that when Weyl acquired the property no one was aware of the gas content.

When on June 27, 1946, Weyl conveyed Henning Tract to McDonald, Ltd. for \$338,375, there was no separate cost basis for the mineral rights. In fact there was no feasible method by which the cost of the mineral rights—as an asset apart from the surface—could be determined. Later in December, 1946, when the separation of surface and mineral rights in Henning Tract occurred for the first time as the result of the deed of the mineral rights, then for the first time it was necessary to determine the value of those rights. This was \$230,000 and the transaction was reported on that basis.

6. **The Commissioner's brief ignores the proposition that the Tax Court's conclusion is in essence an inference drawn from circumstantial evidence.**

The opening brief (section 4, pp. 15-17) pointed out that the facts found by the Tax Court are undisputed; that there is—as the Tax Court admits (Tr. p. 35)—no

direct evidence of an intent to recapture the mineral rights for the purpose of tax avoidance; and that in order to sustain the assessment the Tax Court undertook to draw an inference from circumstantial evidence.

This aspect of the decision is ignored by the Commissioner. His failure to mention it must be regarded as a recognition that the point is unanswerable.

Instead of meeting the issue the Commissioner argues the case as if the Tax Court had made a finding of fact that the conveyance was sham. The Commissioner asserts:

The question is essentially one of fact and in determining the incidence of taxation with respect to the transaction it is necessary to look through the form and ascertain its substance. *Commissioner v. Court Holding Co.*, 328 U. S. 331; *Griffiths v. Commissioner*, 308 U. S. 355; *Higgins v. Smith*, 308 U. S. 473; *Gregory v. Helvering*, 293 U. S. 465. That being so, the findings and conclusions of the Tax Court herein sustaining the Commissioner's determination should not be disturbed unless "clearly erroneous", due regard being had for the opportunity of the trial court to judge the credibility of witnesses (citing cases). (br. p. 15).

In order to reverse the Tax Court it is not necessary to reject any finding of fact. This has been adequately demonstrated in the opening brief.

As to the Commissioner's statement that the "conclusions" of the Tax Court "should not be disturbed unless clearly erroneous" (*supra*, br. p. 15), this is not the law.

In *Kuhn v. Princess Lida*, 119 F. 2d 704 (C.C.A. 3rd) the court discusses the rule that a finding of fact cannot

be disturbed on appeal unless clearly erroneous. Then the opinion proceeds:

The rule does not operate, however, to entrench with like finality the inferences or conclusions drawn by the trial court from its fact findings. And so, while accepting the facts competently found by the trial court as correct, an appellate court remains free to draw the ultimate inferences and *conclusions* which it its opinion, the findings reasonably induce. . . . The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate fact remains appropriate matter for an appellate court's consideration; *State Farm Mutual Automobile Insurance Co. v. Bonacci, et al.*, 8 Cir. 111 F. 2d 412, 415. Where the evidentiary facts are not in conflict or dispute, the conclusions to be drawn therefrom are for the appellate court upon review of the trial court's action. . . . (pp. 705-6.)

In *Sears-Roebuck & Co. v. Johnson*, 219 F. 2d 590 (C.A. 3rd) the question was whether the use by Johnson of a trade-name adopted by Sears-Roebuck & Co. was likely to create confusion in the mind of the public. The District Court held in the negative. On appeal Sears-Roebuck & Co. contended that the evidence clearly warranted the inference of likelihood of confusion. In defense of the judgment Johnson relied on the findings of fact and the "clearly erroneous" rule. The question to be decided was the proper inference to be drawn from the basic facts found by the trial court. Reversing the judgment the court said:

In considering whether or not the district court erred in finding that no likelihood of confusion existed, this court is not bound (although defendants

contend otherwise) by Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C. In disturbing a district court's findings of basic facts, this court is guided by the "clearly erroneous" provision of Rule 52(a). But Rule 52(a) is not applicable where, as here, the dispute is not as to the basic facts, but as to what inference (i.e., ultimate fact) should reasonably be derived from the basic facts. This court, by examining the basic facts found by the district court, can determine, as advantageously as the district court can, whether or not an inference of likelihood of confusion is warranted. (Citing cases.) (p. 591.)

Thus, in the Sears-Roebuck case the Court of Appeals drew an inference from the facts found which was contrary to that adopted by the trial court and favorable to the award of relief to plaintiff. In the case at bar all that is necessary is to decide that the findings of fact do not warrant the inference of tax avoidance adopted by the Tax Court.

7. **The Commissioner's brief ignores the proposition that under settled principles of law as to inconsistent inferences, the decision that the conveyance was sham is without support.**

The rule pertaining to circumstantial evidence and the effect of possible inconsistent inferences was discussed in the opening brief. The pertinent authorities are there cited (section 5, pp. 17-19). All this is ignored by the Commissioner. Surely, the judicial precedents controlling the case at bar are entitled to consideration. Here again the Commissioner's silence is tantamount to the admission that he is unable to answer the point.

8. **The Commissioner seeks to defend his assessment on the same ground adopted by the Tax Court—which is based on mere conjecture and suspicion.**

As we have seen, there was no duty on the part of Weyl to justify the good faith of a transfer to McDonald, Ltd. of Henning Tract in its entirety as opposed to a transfer of the mineral rights alone. The fact that McDonald, Ltd. needed only the surface rights—which neither the Tax Court nor the Commissioner disputes—does not compel the inference that with respect to Weyl's failure to carve out the mineral rights the deed was the first step in a program of tax evasion.

Hence, the decision of the Tax Court has nothing to support it but suspicion and surmise.

Pertinent to this proposition are such assertions in the Commissioner's brief as that concerning the desirability of consolidating the farming operations of McDonald and Henning Tracts. The Commissioner points to the fact that while Holly Sugar Corporation was equally interested with Weyl in McDonald, Ltd., both tracts had been farmed extensively year after year under separate ownership (br. p. 17).

The answer is that when two contiguous parcels come under single control there are many economies to be accomplished by consolidating the title. The fact that therefore the two tracts had been separately farmed does not even tend to dispute the advantages flowing from single ownership. Obviously, there is no merit in the Commissioner's assertion that because of the previous separate operation "the alleged farming and operating reasons pale into insignificance" (br. p. 17).

Another excursion into the realm of imagination is the Commissioner's statement (footnote 8, br. p. 21) that "there is some indication that Standard had prepared papers to effect separate conveyances from taxpayer and McDonald". The same subject is mentioned at page 9 of the Commissioner's brief. The Commissioner merely refers by page number in the transcript to a comment in the Tax Court's opinion and the testimony of Schroeder, the Commissioner's witness.

In our opening brief we analyzed Schroeder's testimony on the subject and demonstrated that, despite vigorous cross-examination by the Commissioner's counsel, Schroeder gave no testimony as to the contents of the document which had been initially prepared by the counsel for Standard Oil Co. The Commissioner's assertion as to "indication" in the evidence is unwarranted.

The foregoing comment is also pertinent to the Commissioner's assertion that "viewing the overall transaction, the ultimate sale of the gas rights must have been anticipated by taxpayer's president, Maurice Zuckerman, prior to June 27, 1946," (br. p. 22.) This is a gratuitous assumption; it is not warranted either by the evidence or the findings.

At page 23 of his brief the Commissioner says that as the result of the purchase of Holly Corporation's shares in McDonald, Ltd. the taxpayer "had complete control over both tracts." This is true.

But there is no basis for the conclusion which the Commissioner seeks to draw—that the taxpayer "was in a position to control and handle the possible settlement of

the difficulties with Standard by sale on its own terms." (br. p. 23.) It is obvious that the terms of sale could not be dictated by Weyl. It takes two to make a bargain. If Standard had adhered to its initial offer, there would have been no sale at all.

Another excursion on the part of the Commissioner into the realm of imagination occurs in his assertion that included in the dividend of December, 1946, from McDonald, Ltd. to Weyl were some mineral rights which were not conveyed to Standard Oil and that these retained rights had a value which should have been reported by Weyl. (footnote 3, br. p. 14.) There is no evidence to support the Commissioner's assertion that these additional rights had value. He advanced the same contention in the Tax Court. It was rebutted and the Tax Court apparently was convinced because its opinion does not mention the subject.

The retained rights to which the Commissioner refers were minerals other than gas and also the gas below the eocene-cretaceous contacts. The Engineer Revenue Agent investigated this aspect and reported that these rights had no "particular value." This finding, dated April 18, 1949, is a part of the Revenue Agent's report and is as follows:

Value of mineral rights retained

It is believed that no particular value can be attributed to mineral rights retained.

Weyl-Zuckerman #1 penetrated the Cretaceous for about 2000 feet with no reported showings. The Cretaceous has been producing in only one gas field in

Northern California and here the record shows the Eocene was missing. It has been concluded that the value of any retained mineral rights is too speculative to warrant the establishment of any particular value.

Furthermore, the subject is immaterial to any issue in the case. It has nothing to do with the business purpose of the conveyance of the Henning Tract made by Weyl to McDonald on June 27, 1946.

The only purpose of the Commissioner in going so far afield is to impugn Weyl's conduct and inspire prejudice.

The ultimate and most far-reaching surmise on the part of the Commissioner is that in June, 1946—when Weyl conveyed Henning Tract to McDonald, Ltd.—this was done in contemplation of a future sale of the mineral rights to Standard Oil Co. In the opening brief (section 6, pp. 26-30) the conditions which prevailed in June, 1946 are set forth in detail. There we demonstrated that the circumstances indicated the unlikelihood of a sale. In the face of this evidence the Commissioner undertakes to present as his concluding argument—echoing the theory of the Tax Court—that “on the evidence as a whole the possible sale to Standard was contemplated from the beginning” (br. pp. 26-27). On the contrary, the evidence demonstrates that there appeared to be no possibility of a sale. Furthermore, the decision as to intent to evade taxes cannot be supported on the mere speculative ground that a sale was within the realm of possibility.

9. **The Commissioner criticizes the sale of Henning Tract at cost but fails to answer the reasons advanced in the opening brief justifying this aspect of the transaction.**

The opening brief (section 7, pp. 33-36) demonstrates the propriety of the sale at cost and the immateriality of the increase in value which had theretofore been recorded on Weyl's books.

The Commissioner fails to answer this argument. In his brief (pp. 4-5; 23-24) he is content to repeat the comments of the Tax Court which insinuate that the transaction is open to criticism because the sale was made at cost. Finally, the Commissioner says:

Regardless of what proper accounting and bookkeeping procedure might require in the case of a sale of an asset by a parent to its subsidiary at more than cost, that certainly did not prevent a sale of the Henning Tract mineral rights at their market value. (br. p. 24.)

In the above extract the Commissioner incorrectly states the point presented in the taxpayer's opening brief (pp. 33-36). As to the assertion that nothing prevented a sale at market value, this certainly does not provide any sound reason why the sale should have been made on that basis. It is obvious that merely because it is permissible to pursue a particular course, it does not follow that failure to pursue it constitutes evidence of bad faith.

10. **There is no evidence that the dividend of December, 1946, was planned at the time of the conveyance of Henning Tract by Weyl to McDonald, Ltd.**

The conclusion of the Tax Court that a round-trip of the Henning Tract rights was planned from the beginning

does not suffice to support the deficiency assessment. There must be evidence that the dividend was contemplated as a part of the original scheme. In our opening brief we pointed out that neither of these conclusions finds any support in the evidence.

The Commissioner's attack on the dividend is not only inadequate to accomplish his objective. Even as far as it goes, it is fallacious.

Concerning the consequences of a direct conveyance by McDonald, Ltd. to Standard Oil the Commissioner argues that "McDonald would have received ample funds with which to meet its obligation" to pay the Bank \$50,000 on the principal of the loan. (br. pp. 11-12.) The answer is that all the funds derived from the loan were needed to pay pressing obligations and were used for that purpose.

The Commissioner attacks the dividend as an effort by McDonald, Ltd. to "evade its contractual obligation to the Bank of America." (br. p. 20.) The word "evade" is not justified. All that was accomplished was an essential postponement of maturity of a part of the principal.

The Commissioner says that "McDonald could not profit in the long run by such a maneuver." (br. p. 20.) The answer is that McDonald, Ltd. was seeking not profit but—as we have seen—deferment.

The Commissioner says that by direct sale McDonald, Ltd. "would have received the \$230,000 and thus would have had ample funds with which to honestly meet its obligations." (br. p. 20.) Again the answer is that the \$50,000 could not be spared. The unwarranted implica-

tion that the course pursued was dishonest does not merit a reply.

The Commissioner's criticism of the protest (br. pp. 20-1) has been anticipated in our opening brief (pp. 29-30, n. 4). No further comment is necessary except to point out that the partial quotation at page 21 of the Commissioner's brief does not accurately reflect the full import of the protest.

The Commissioner cites the *Transport Trad. & Term. Corp.*, case (176 F. 2d 570, 572 (C.A. 2d)) contending that it supports the conclusion that the dividend by McDonald, Ltd. "can only be considered as a distribution to escape a tax." (br. p. 25.) The *Transport* decision is adequately explained in our opening brief (p. 38). There was no business reason for the dividend in that case.

Finally, the Commissioner's brief quotes from *C.I.R. v. Court Holding Co.*, 324 U.S. 331, 334, a statement that a "transaction must be viewed as a whole . . . from the commencement of negotiations to the consummation of the sale." In that case the negotiations were continuous up to the point of consummation; in the case at bar the negotiations were broken off and the subject of sale was abandoned until later reopened. Furthermore, the rationale of the *Court Holding Co.* case cannot accurately be appraised without considering *U. S. v. Cumberland Co.*, 338 U.S. 451, 94 L. Ed. 251, where the opposite result was reached on the basis of facts which were somewhat similar. The Court held that those in control of a corporation can select a roundabout course for disposing of a corporate asset and maintain the

integrity of the transaction even though the choice is dictated solely by an intent to escape taxation and without any business necessity.

Dated, San Francisco, California,
February 23, 1956.

Respectfully submitted,
DAVID LIVINGSTON,
Attorney for Petitioner.

(Appendix Follows.)

Appendix.

Appendix

San Joaquin Brick Co. v. Commissioner of Int. Rev., 130 F. 2d 220 (C.C.A. 9th) (1942)

“ . . . (T)he argument of both parties to this appeal on the question of the conclusiveness of the Board’s finding discloses a misunderstanding of the expressions often made by the Courts that the Commissioner’s determination is supported by a presumption of correctness and that the taxpayer has the burden of showing it to be wrong. See, for instance, *Welch v. Helvering*, 290 U.S. 111, 115, 54 S.Ct. 8, 78 L.Ed. 212.

In *Perry v. Commissioner*, 9 Cir., 120 F. 2d 123, 124, this Court undertook to explain such expressions by saying, ‘This finding (the determination of the Commissioner) is presumptively correct, that is, until the taxpayer proceeds with competent and relevant evidence to support his position, the determination of the Commissioner stands. When such evidence has been adduced the issue depends wholly upon the evidence so adduced and the evidence to be adduced by the Commissioner. The Commissioner cannot rely upon his determination as evidence of its correctness either directly or as affecting the burden of proof.’ ”

No. 14786

United States
Court of Appeals
for the Ninth Circuit

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILE

AUG 3 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Chief of Civil Division;

ANDREW J. WEISZ,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

United States District Court, Southern District of
California, Central Division

No. 18089-WM

HALLDORA KRISTIN SIGURDSON,

Plaintiff.

vs.

ALBERT DEL GUERCIO, JOHN DOE and
RICHARD ROE,

Defendants.

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION

Comes now the plaintiff Halldora Kristin Sigurdson and for cause of action against the defendants, and each of them, complains and alleges:

I.

That she now is and for more than ten (10) years last past has been a resident of the County of Los Angeles, State of California, being in the jurisdiction of the above-described court.

II.

That this Court has jurisdiction of the above-described action for a Declaratory Judgment by virtue of the provisions of the Act of June 14, 1934, as amended, commonly known as the Declaratory Judgments Act (Title 28, United States Code, Section 2201, et seq.).

III.

That the defendant Albert Del Guercio is the duly appointed Officer in Charge of the Los Angeles office of the Immigration and [2*] Naturalization Service of the United States and is under the supervision and direction of the Attorney General of the United States and the Commissioner of Immigration and Naturalization, as well as the District Director for this district, said District Director having headquarters in San Francisco, California; that said defendant Albert Del Guercio, as Officer in charge of the Los Angeles office, is charged with the administration and execution within said area of the above District of the Immigration and Naturalization Service orders and the immigration laws of the United States.

That plaintiff is informed and believes that defendants John Doe and Richard Roe are Acting Officers in Charge of the Los Angeles office of above-described agency with the same rights, duty and responsibility as the Officer in charge, as alleged, and that plaintiff so alleges upon her information and belief.

IV.

That plaintiff does not know the true name or names of the defendants sued herein under the fictitious names of John Doe and Richard Roe and asks leave of this Court to amend showing the true name when same shall be duly ascertained.

V.

That on or about the 30th day of March, 1953, the then District Director of this area for the above-described service, H. R. Landon, as District Director of the Immigration and Naturalization Service issued or caused to be issued an Order of Deportation directing that the plaintiff be taken into custody and deported from the United States to Canada. Plaintiff is informed and believes and upon said ground avers that said Order of Deportation has never since been cancelled or vacated.

VI.

Plaintiff alleges that all administrative remedies have been exhausted. [3]

VII.

That plaintiff filed a petition for writ of Habeus Corpus in this court on June 24, 1953, and said petition was denied on July 28, 1953. The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the trial court on September 7, 1954, and the United States Supreme Court denied writ of certiorari on January 10, 1955.

VIII.

Plaintiff contends that by virtue of said Order of Deportation she is about to be taken into custody for deportation and deprived of her liberty unlawfully, in violation of due process and the Fifth Amendment to the Constitution of the United States, for reasons as hereinafter more fully set forth.

IX.

That on or about the 29th day of December, 1946, plaintiff entered the United States at Blaine, Washington, for permanent residence after full and complete compliance with the appertaining law; that she had been a resident since March, 1944, and permanent residence admission secured thereafter as alleged. That at all times since said December 29, 1946, plaintiff has been, and still is, a lawful permanent resident of the United States.

X.

That plaintiff attended the University of Southern California at Los Angeles from 1944 to 1950, attaining the collegiate degrees of A.B. and A.M. That the degree of A.B. was secured in 1948, A.M. in 1950. That she was a regular student for the bachelor's degree, while the master's degree was secured after obtaining employment as a teacher. That in July, 1949, plaintiff took a two-week vacation trip to Mexico and the last entry at San Ysidro, California, was the basis of the charge upon which the warrant of deportation was based. [4]

XI.

That plaintiff filed her "Preliminary Form for Naturalization and Certificate of Arrival" early in the year 1951 and she has been awaiting processing of same since said date of filing.

XII.

That during October, 1950, in response to a request for information from said service, plaintiff

was asked to report to said office at 1 p.m. on November 2, 1950. That she reported as requested and was interrogated by two investigators who were supposed to but did not record the interview, recording on a Dictaphone machine only what they desired and/or commanded plaintiff to state. That plaintiff is informed and believes and upon said ground alleges that eight Dictaphone belts were required to record as much as the investigators felt inclined.

XIII.

That the said investigators of said service presented alleged transcripts of said interview of November 2, 1950, for signature to plaintiff and she refused to sign same on the grounds that they, and each of them, were inaccurate, incomplete and not made freely and voluntarily.

XIV

That on or about the 11th day of October, 1951, plaintiff was served with a warrant of arrest for deportation upon the grounds that she had been a member of the Communist Party of the United States prior to her entry in 1949; that while she was a student at the university, it was claimed that she was a member of a club which was the campus cell of the communist organization.

XV.

That said warrant, plaintiff is informed and believes and upon said ground alleges, was based upon the illegal and unconstitutional examination of Nov.

2, 1950, and the testimony of two professional witnesses, both of whom are perjurers. [5]

XVI.

That she was granted a "so-called" hearing by the immigration service and the alleged statement of the November 2, 1950, interrogation was admitted into evidence over proper and valid legal objections and proof of its inadmissibility and proof that it was based upon spurious Dictaphone belts; that the hearing officer denied plaintiff the right to have the Dictaphone belts examined by Dictaphone Corporation experts to prove their spuriousness; that the hearing officer denied plaintiff right of reasonable cross-examination of a Government witness whom plaintiff subsequently proved a perjurer by documentary evidence; and, the hearing officer failed, neglected and refused to comply with the law set forth in 8 Code of Federal Regulations appertaining to conduct of deportation hearing.

XVII.

That the habeus corpus proceeding was a denial of due process of law in that the immigration service failed to and refused to file with the Court a full and complete immigration file and the documents required under the Order to Show Cause issued at the time of filing of the petition for writ of habeus corpus.

XVIII.

That the Immigration and Naturalization Service, by and through its then local District Director,

H. R. Landon, has issued an Order of Deportation predicated upon the alleged statement of November 2, 1950, and the testimony of the two "alleged" witnesses and the decision of the hearing officer, all as hereinabove alleged, against the plaintiff on the ground that she had, prior to her re-entry, been a member of the communist party of the United States and by reason of the foregoing there is an actual controversy existing between the parties hereto with respect to the validity of said Order of Deportation and with respect to the enforcement thereof against the plaintiff by the defendants and/or defendant. [6]

XIX.

Plaintiff is informed and believes and upon the basis of said information and belief alleges that unless restrained by the Order of this Honorable Court, the defendant Albert Del Guercio, and/or defendants John Doe and Richard Roe, by and through his/their agents and employees intends to and will take plaintiff into custody under color of said Order of Deportation and will deprive her of her liberty and of the opportunity to earn her livelihood, to her irreparable damage, and will continue to act without authorization in law and threatens to and will deprive plaintiff of her liberty without recourse.

XX.

Plaintiff seeks (1) a Declaratory Judgment that the Order for the deportation of plaintiff issued, as aforesaid, on the 30th day of March, 1953, is

void and without force or effect and, (2) an injunction restraining defendants, or any of them, from proceeding against the plaintiff under said Order, pending the determination of the validity of said order.

Plaintiff is without a plain, speedy or adequate remedy at law to prevent or redress such irreparable damage and injury as will result from her summary removal from the United States.

Whereupon, Plaintiff Prays Judgment as Follows:

1. That the Order of Deportation issued by the immigration service be declared illegal and void and without force or effect;
2. That an order be issued permanently enjoining and restraining defendants, or any of them, from deporting plaintiff;
3. Such other and further relief as is proper.

/s/ JOHN P. TOBIN,

Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed April 18, 1955. [7]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

To Albert Del Guercio, Officer in Charge of the Los Angeles office of the United States Immigration and Naturalization Service, and John Doe and Richard Roe, Acting Officer/Officers of said office for said agency of the Government:

Upon reading the verified complaint on file herein and good cause appearing therefore,

It Is Hereby Ordered That You be and appear in Courtroom No. 2 of the above-entitled court on the 25th day of April, 1955, at the hour of 10 a.m. to show cause, if any you have, why the plaintiff Halldora Kristin Sigurdson should not receive the relief prayed for in the complaint on file herein, and,

It Is Further Ordered that pending the hearing of said Order to Show Cause the defendants, and each of them, be and is restrained and enjoined from deporting said plaintiff.

Dated: April 18, 1955.

/s/ WM. C. MATHES,
Judge.

[Endorsed]: Filed April 18, 1955. [9]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

To the Plaintiff Above Named, Halldora Kristin Sigurdson, and to John P. Tobin, Her Attorney:

You and Each of You Will Please Take Notice that the defendant Albert Del Guercio, by and through the undersigned, will bring the following Motion to Dismiss, pursuant to Rule 12(b)(1), (6), and (7), Federal Rules of Civil Procedure, on for hearing before the above-entitled Court, in the Courtroom of the Honorable William M. Byrne, United States District Judge, in the United States Post Office and Courthouse Building, 312 North Spring Street, Los Angeles, California, on Monday the 2nd day of May, 1955, at 9:45 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: April 22, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

ANDREW J. WEISZ,
Assistant U. S. Attorney;

/s/ ANDREW J. WEISZ,
Attorneys for Defendant,
Albert Del Guercio. [11]

Motion to Dismiss

The defendant, Albert Del Guercio, as officer in charge of the Immigration and Naturalization Service, Los Angeles, California, appearing specially for this purpose, moves the Court for dismissal of the within action, pursuant to Rule 12(b)(1), (6), and (7), Federal Rules of Civil Procedure, on the following grounds:

1. This Court lacks jurisdiction over the subject matter of the instant action, and plaintiff has failed to allege statutory authority for the jurisdiction of this Court.

2. The Complaint on file herein fails to state a claim upon which relief can be granted for the reasons that the issues raised by the Complaint are settled by the decision in the case of Sigurdson v. Landon, Civil No. 15648-C, and the Order of Deportation may not be reviewed in these proceedings.

3. The Complaint on file herein, if the above grounds are not well taken, fails to join indispensable parties.

This Motion is based and will be presented upon the Complaint of plaintiff on file herein, these Motion papers and the accompanying Memorandum of Points and Authorities in support thereof, together with all the records and files of this action and the action entitled Sigurdson vs. Landon, Civil No. 15648-C.

Dated: April 22, 1955.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

ANDREW J. WEISZ,
Assistant U. S. Attorney;

/s/ ANDREW J. WEISZ,
Attorneys for Defendant,
Albert Del Guercio. [12]

Memorandum of Points and Authorities in Support
of Motion to Dismiss

The Complaint alleges jurisdiction under the provisions of Sections 2201, et seq., of Title 28, U.S.C. It is clear that the Declaratory Judgment Act does not confer any added jurisdiction upon the Federal Courts, but merely enlarges the "range of remedies available." (*Skelly Oil Company v. Phillips Company*, 339 U. S. 667, 671 (1950).) Thus, the complaint fails to allege jurisdiction in this Court.

If one were to disregard the failure to allege subsidiary jurisdiction upon which the claim for declaratory relief is predicated, it is nevertheless apparent that the pleader does not and cannot state a claim upon which relief can be granted. On its face, it is apparent that the Complaint is an attempt to convert the usual type of case in the form

of habeas corpus or judicial review under the Administrative Procedure Act into a Declaratory Judgment Action. The indispensable prerequisite of declaratory relief is the presence of an "actual controversy." (Section 2201, Title 28, United States Code.) As between the plaintiff and the defendant, Del Guercio, it is clear that there is not an actual controversy. (*Rodriguez v. Landon*, 212 F. 2d 508, 509 (C.A. 9, 1954).)

There is, however, an even more cogent reason why the Complaint fails to state a claim upon which relief can be granted. Whether a Deportation Order is reviewable in habeas corpus proceedings, judicial review proceedings, or both (*Aguilera-Flores v. Landon*, 125 F. Supp. 55), a complete review of the validity of a Deportation Order in one such proceeding would necessarily bar later actions in a different form to accomplish the same purpose. It is a cardinal principle that there must be an end to vexatious litigation, which is embodied in the principle of *res judicata*. [13] An examination of the record in the previous habeas corpus proceeding that came before this Court, bearing Civil No. 15648-C, or of the opinion of the Court of Appeals for the Ninth Circuit in that case, reported at 215 F. (2d) 791, establishes that each of plaintiff's contentions has received official consideration, and has been decided against her. The prior judgment not only establishes conclusively that the Order of Deportation is valid, and that the contentions of petitioner concerning invalidity are

not well taken, but also establishes that there is no actual controversy, and that the Complaint was lodged only for the purposes of delay.

It should be further noted that the prior decision is not *res judicata* only as to officers superior to H. R. Landon, named as a defendant in the prior action. (The defendant, Del Guercio, was named in the prior action.) Legalistically, one might argue that plaintiff is not bound by the prior judgment if she were suing a superior officer. In such an instance, there would be the lack of an indispensable party.

Wherefore, this defendant prays that the Complaint filed in this cause be dismissed, the Temporary Restraining Order be dissolved, and that the relief prayed for in the Complaint be denied.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

ANDREW J. WEISZ,
Assistant U. S. Attorney;

/s/ ANDREW J. WEISZ,
Attorneys for Defendant,
Albert Del Guercio.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 22, 1955. [14]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I.

This Court has jurisdiction of the above-described matter.

Shaughnessy vs. Pedreiro

No. 374 October Term, 1954, of U. S. Supreme Court. Decision: April 25, 1955.

II.

Allegation of jurisdiction in complaint is sufficient.

Shaughnessy vs. Pedreiro, *supra*

Flores vs. Landon

125 Fed. Supp. 55; #16587 WB this court files.

5 USC 1009 (b); (e)(6).

III.

Temporary Injunction pending final determination proper.

5 USC 1009 (d).

IV.

All necessary parties defendant have been named herein.

Shaughnessy vs. Pedreiro, *supra*. [16]

V.

Alien may test the validity of deportation order

by either complaint for declaratory relief or habeus corpus petition. The ruling on one is not res judicata to the other or subsequent filings of same.

Shaughnessy vs. Pedreiro, *supra*.

Respectfully submitted,

/s/ JOHN P. TOBIN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 2, 1955. [17]

[Title of District Court and Cause.]

MINUTES OF THE COURT—MAY 2, 1955

Present: Hon. Wm M. Byrne, District Judge.

Counsel for Plaintiff: John P. Tobin.

Counsel for Defendant: Andrew J. Weisz,
Assistant U. S. Attorney.

Proceedings: For hearing on motion to dismiss,
and for hearing Order to Show Cause.

It Is Ordered that motion to dismiss is granted.

EDMUND L. SMITH,
Clerk;

By CHARLES A. SEITZ,
Deputy Clerk. [18]

United States District Court, Southern District of
California, Central Division

No. 18089-WB

HALLDORA KRISTIN SIGURDSON,

Plaintiff,

vs.

ALBERT DEL GUERCIO, JOHN DOE and
RICHARD ROE,

Defendants.

ORDER OF DISMISSAL

The above-entitled matter came on regularly for hearing of defendant Del Guercio's Motion to Dismiss, under Rule 12(b)(1), (6), and (7) of the Federal Rules of Civil Procedure, on May 2, 1955, in the above-entitled Court, before the Honorable William M. Byrne, Judge Presiding, plaintiff being represented by her attorney, John P. Tobin, and the defendant Del Guercio being represented by his attorneys Laughlin E. Waters, United States Attorney; Max F. Deutz and Andrew J. Weisz, Assistants United States Attorney, by Andrew J. Weisz; and the Court having considered the Motion to Dismiss and the authorities of the parties, and having heard the argument of counsel; and it appearing that the complaint alleges jurisdiction of the action under the provisions of Section 2201, et seq., of Title 28 U. S. C., and it appearing to the Court that said section does not confer jurisdiction

on the Court, and that the Court does not otherwise have jurisdiction to review the matters alleged to have been passed upon by the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff's complaint on file herein be and the same is hereby dismissed for lack of jurisdiction over the [19] subject matter.

It Is Further Ordered that the Temporary Restraining Order heretofore issued on April 18, 1955, be, and the same is hereby dissolved.

It Is Further Ordered that the defendant, Del Guercio have his costs against the plaintiff.

Dated: This 2nd day of May, 1955.

/s/ WM. M. BYRNE,

United States District Judge.

[Endorsed]: Filed May 2, 1955.

Judgment docketed and entered May 2, 1955. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73 (B)

Notice is hereby given that Halldora Kristin Sigurdson, plaintiff in the above-described action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from:

1. The Order of May 2, 1955, dismissing plain-

tiff's complaint for Declaratory Judgment and Injunction;

2. Order of May 2, 1955, discharging the Order to Show Cause; and,

3. The final Order or Judgment made in the above matter.

Dated at Los Angeles this 2nd day of May, 1955.

/s/ JOHN P. TOBIN,

Attorney for Plaintiff-
Appellant.

Affidavit of Mailing attached.

[Endorsed]: Filed May 2, 1955. [21]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 23, inclusive, contain the original

Complaint for Declaratory Judgment and Injunction.

Order to Show Cause & Temporary Restraining Order.

Motion & Notice of Motion to Dismiss, etc.

Points & Authorities in Opposition to defendants Motion to Dismiss.

Order of Dismissal.

Notice of Appeal.

Designation of Contents of Record on Appeal.

which, together with a full, true and correct copy of the Minutes of the Court on May 2, 1955, all in said cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 9th day of June, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk.

/s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 14786. United States Court of Appeals for the Ninth Circuit. Halldora Kristin Sigurdson, Appellant, vs. Albert Del Guercio, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 10, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

At a Stated Term, to wit: The October Term 1954, of the United States Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City and County of San Francisco, in the State of California, on Friday the sixth day of May in the year of our Lord one thousand nine hundred and fifty-five.

No. 14786

HALLDORA KRISTIN SIGURDSON.

Appellant,

vs.

ALBERT DEL GUERCIO, et al.,

Appellees.

ORDER SUBMITTING AND GRANTING
MOTION FOR RESTRAINING ORDER

Ordered motion of appellant for an order restraining the deportation of appellant from the jurisdiction of this Court pending determination of her appeal herein, presented by Mr. John P. Tobin, counsel for appellant, and by Mr. Andrew J. Weisz, Assistant United States Attorney, counsel for appellee, and submitted to the court for consideration and decision.

On consideration thereof, It Is Further Ordered that the deportation of Halldora Kristin Sigurdson be stayed until the further order of this court.

In the United States Court of Appeals
for the Ninth Circuit

No. 14786

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO, JOHN DOE and
RICHARD ROE,

Respondents.

STIPULATION RE: POINTS ON APPEAL
AND PARTIAL CONTENTS OF REPORT-
ER'S TRANSCRIPT

It is hereby stipulated by and between the under-
signed counsel for the above-named and described
parties:

1. That the points on appeal briefly stated are:
 - a. Did the District Court have jurisdiction;
 - b. Did the District Court abuse its discre-
tion in denying appellant right to amend her
complaint.
2. That the reporter's transcript of the proceed-
ings in the District Court of the above matter on
May 2, 1955, would show, if prepared from the said
reporter's notes, that counsel for appellant asked
for permission to amend the complaint herein to
correctly designate statutory jurisdiction of the Dis-
trict Court, and that the trial court denied right to

amend on the ground, amongst others, that the plaintiff, appellant herein, could not properly allege a cause of action giving District Court jurisdiction and this stipulation is made for the purpose of avoiding necessity of preparing a reporter's transcript of the proceedings for that one point.

Dated: June 10, 1955.

/s/ JOHN P. TOBIN,

Attorney for the Plaintiff-
Appellant.

LAUGHLIN E. WATERS,

U. S. Attorney;

MAX F. DEUTZ,

ANDREW J. WEISZ,

Assistants U. S. Attorney;

By /s/ ANDREW J. WEISZ,

Attorneys for Albert Del
Guercio, Appellee.

[Endorsed]: Filed June 13, 1955.

No. 14786.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

JOHN P. TOBIN,

6331 Hollywood Boulevard,
Los Angeles 28, California,

Attorney for Appellant.

FILED

SEP -

PAUL P. HARRIS, CLERK

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No. 14786.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Jurisdictional Facts.

A verified complaint entitled "Complaint for Declaratory Judgment and Injunction" was filed on April 18, 1955, in the District Court for the Southern District of California by the appellant while at liberty on bond [3-10¹]. The defendant was Albert Del Guercio, appellee herein, and officer in charge of the Los Angeles office of the United States Immigration and Naturalization Service [4].

Attorney for appellant incorrectly alleged statutory jurisdiction for the District Court under the Declaratory

¹Bracketed numbers refer to pages in printed Transcript of Record unless clearly different by context.

Judgments Act (Act of June 14, 1934, as amended, Title 28, U. S. C. A. 2201, *et seq.*) [3]. However, paragraph 111 of said complaint [4] very specifically spells out jurisdiction for a federal issue by alleging that defendant was an officer of the United States Immigration and Naturalization Service under the supervision and control of the Attorney General of the United States and the Commissioner of Immigration.²

The complaint alleged that an order for her deportation was issued on March 30, 1953 [9] on the ground that she had been a member of the Communist Party prior to her last entry [7]³ and that an actual controversy exists respecting the validity of said order, and the enforcement thereof [9].

She alleged that she had been granted a “so-called” hearing and that the Order of Deportation was predicated upon spurious Dictaphone belts, testimony of two witnesses, perjurers, and the decision of the immigration service hearing officer [9]. She alleged that the hearing officer:

1. Denied her the right to prove Dictaphone belts were spurious (testimony of two immigration officers showing belts impropriety was in record);
2. Admitted illegal and inadmissible evidence over valid legal objections;
3. Denied right of reasonable cross-examination of Government “expert” witness; and,
4. Failed, neglected and refused to comply with the law appertaining to conduct of deportation hearings [8].

²United States Constitution, Article I, Section 8; 28 U. S. C. A. 1331; and, 8 U. S. C. A. 1251, *infra*.

³Internal Security Act of 1950, Section 22, 64 Stat. 987, 1006.

The complaint alleged that all administrative remedies were exhausted [5] and that prior to the filing of the complaint, she had filed a petition for writ of habeas corpus in the same District Court; that the petition for habeas corpus was denied and said decision of denial was affirmed on appeal to the United States Court of Appeals for the Ninth Circuit; and, that the Supreme Court of the United States had denied her petition for writ of certiorari [5].

The complaint alleged that the habeas corpus proceeding, *supra*, was a denial of due process [8].

Prayer of her complaint was for a judgment declaring:

1. Order of Deportation illegal and void and without force and effect; and,
2. Permanent injunction against deportation.

An order to show cause was issued same day with hearing set for April 25, 1955, thereafter continued until May 2, 1955. A temporary restraining order was issued restraining appellee from deporting appellant.

Appellant Del Guercio on April 22, 1955, filed his Notice of Motion to Dismiss, etc. [12-16], pursuant to Rule 12(b)(1), (6), (7), Federal Rules of Civil Procedure⁴ on the following grounds:

1. District Court lacked jurisdiction and that complaint failed to allege statutory authority for jurisdiction;

⁴Rule 12, Federal Rules of Civil Procedure, 28 U. S. C. A.:

“(b) Every defense . . . shall be asserted . . . except that the following defenses may . . . be made by motion:

- (1) Lack of jurisdiction over the subject matter;
- (6) Failure to state a claim upon which relief can be granted;
- (7) Failure to join an indispensable party. . . .”

2. *Res adjudicata* by virtue of the prior decision in the habeas corpus proceedings; and,

3. Failure to join indispensable parties.

Appellant filed her counter points of authority in opposition to the motion to dismiss [17] setting forth that the District Court had jurisdiction and that the allegation of same was sufficient. It further set forth that all necessary parties were named defendant and that the prior ruling on the habeas corpus petition was not *res judicata*.

The Honorable Wm. M. Byrne, District Judge, granted the motion to dismiss and made and signed the Order of Dismissal on ground of lack of jurisdiction and dissolved the restraining order against deportation of appellant [19].

Appellant filed her Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from said Order on the same day, May 2, 1955 [20].

(Attention is directed to the stipulation wherein it shows that appellant's counsel asked for and was denied right to amend complaint [24].)

The District Court had jurisdiction by virtue of Section 10, Administrative Procedure Act of 1946, 60 Stat. 237, *et seq.*, 5 U. S. C. A. 1009,⁵ which, while not properly alleged was shown by the pleading of a federal issue (see footnote 2) in the other paragraphs of the complaint, namely, deportation of alien. Moreover, appellant asked for and was denied permission to amend to correctly designate statutory jurisdiction for the lower court [24].

⁵See appendix.

The United States Court of Appeals for the Ninth Circuit has jurisdiction by virtue of the timely filing of the Notice of Appeal [20] from the Order of Dismissal, a final judgment, 62 Stat. 929; 28 U. S. C. 1291.

Statement of the Case.

Appellant was born in Canada, of which country she is a national. She has been a resident of the Los Angeles area since 1944, a permanent resident since 1946 [6]. Her "Preliminary Form for Naturalization and Certificate of Arrival" was filed early in 1951 and she has been awaiting citizenship processing since then [6]. In 1949, she took a two-week vacation to Mexico and her re-entry at San Ysidro, California, was the basis for the immigration service charge that she had been a member of the Communist Party of the United States prior to her last entry [6], *supra*.

The alleged subversivism related to a short period while appellant was a student at the University of Southern California and allegedly consisted of membership in an organization called the John Reed Club, a communist cell at the university [7]. She has denied and continues to deny membership or attendance or even knowledge of the club.

On November 2, 1950 [6], in response to a request from the immigration officer, she went to the Los Angeles office of said service. There and then she was taken by two investigators, Habell and Chandler, to a small office and questioned continuously from approximately 1:00 P. M. to 4:45 P. M. with windows closed, despite temperatures of 91°, and continuous smoking by the two investigators. The interview was allegedly re-

corded in part by means of a Dictaphone, belt type. The recorder was operated by the investigators who testified at the deportation hearing that they were experienced with its operation and control and the type of sounds made on a playback of the belts and how they were made and when they were made. Three different transcripts of the alleged recording were presented to appellant for signature prior to the filing of the charge against her. She refused to subscribe her signature to any of them and in a verified written statement filed on November 20, 1950, with the service, she gave as her reasons for refusal to sign them, or any of them, that they, and each of them, were incomplete, inaccurate and not made freely and voluntarily, and, in said statement denied ever being a commie. She was without counsel on November 2, 1950, but has been represented by one since November 4, 1950, and secured said counsel upon the recommendation of her physician.

On October 11, 1951, appellant was served with a warrant of arrest for deportation on the ground that she had been a member of the Communist Party prior to her last entry [7], *supra*. She was granted a "hearing" by the agency and at said hearing an alleged typewritten statement (different from the other three), was admitted into evidence over proper and valid legal objections and proof that it was based upon spurious Dictaphone belts [8]. Government's own Examining Officer stated upon the record at the hearing that he had eight belts from said interview of November 2. Yet, playback of statement admitted required but five belts. The other three belts have never been introduced any where, despite habeas corpus order to show cause demanded production of them.

As previously set forth, two Government witnesses, Habell and Chandler, had been qualified as "experts" on Dictaphone use and operation and each testified at the hearing that on a playback of the belts used on November 2, 1950, a "click" would be audible to indicate each stopping and starting again of the recorder. It was the unanimous testimony that there were many, many stoppings of the machine during the interview. At the playback but one "click" was heard and never has this statement been challenged by the Government although repeatedly made by appellant.

Even though appellant forcefully believes that the testimony of the two witnesses was sufficient to challenge the belts, she sought and was denied right by the hearing officer [8] to have the belts examined by the experts of the Dictaphone manufacturer. In passing, we desire to point out that if the trial court had not dismissed the complaint, appellant would have produced the said experts from the Dictaphone firm to prove that the belts admitted at the hearing were not originals. At the hearing it was the opinion of the appellant that a matter as serious as this should be determined by the most competent experts available in order that justice be done.

The hearing officer denied reasonable cross-examination of Government "expert" witness whom appellant subsequently proved a perjurer by documentary evidence [8]. In his decision the hearing officer attempted to excuse the perjury by questionable language which verily showed his prejudice and unfairness. Now and before the immigration service, and at all times since, appellant has contended that the hearing officer had the right to believe even a proven perjurer, but when he, a quasi-judge, at-

tempted to justify his right to belief of the proven perjurer, and perjury, he evinced lack of fairness and displayed utter disregard of the rules on duties of hearing officer [8-9].

Appellant alleged in her complaint that by virtue of the Order of Deportation issued March 30, 1953 [5], she was about to be taken into custody and deprived of her liberty in violation of due process of law [5] and that an actual controversy exists between appellant and appellee with respect to the validity of said order and enforcement, thereof [9]. She prayed that the District Court would grant her a declaratory judgment that the said order was illegal and void and without force and effect and a permanent injunction against deportation [9-10], alleging that she had no plain, speedy or adequate remedy to prevent her summary removal from the United States [10].

Appellant exhausted all administrative remedies [5] and in 1953, after being taken into custody under the said order, she filed her petition for writ of habeas corpus in the same district court. Her petition for writ was denied and the trial court was affirmed on appeal (215 F. 2d 791); petition for writ of certiorari to the United States Supreme Court was denied (348 U. S. 916).

Appellee filed his motion to dismiss on the grounds previously set forth under Rule 12 (b)(1), (6), and (7), Federal Rules of Civil Procedure, *supra*.

Appellant requested and was denied permission by the trial court to amend complaint to correctly allege statutory claim for jurisdiction [24]. The motion to dismiss the complaint was granted [19].

It is respectfully contended by the appellant that she had the right to amend her complaint before responsive pleading by appellee, *infra*, and that she had the right to prosecute her complaint against appellee alone in accord with the relief provided by Congress and which the Supreme Court has declared is an appropriate procedure, *infra*; that the prior ruling on the habeas corpus proceedings was not a bar; and, that the trial court abused its discretion in denying her the right to amend, as aforesaid, for the reason that it would be in interests of justice, *infra*, and that the complaint in paragraphs III [4], V [5], VIII [5], X [6], XIV [7], XV [7], XVI [8], XVIII [8], XIX [9], and XX [9], as well as the prayer, all show that a federal question is involved and alleged in such a manner as to cure the erroneous designation of statutory jurisdiction. The complaint is not defective, albeit admittedly in error as set forth herein.

Specifications of Error.

The appellant makes the following specifications of error of the District Court:

I.

The District Court erred in making said judgment and order.

II.

The District Court had jurisdiction of the action set forth in the complaint by virtue of the allegations of paragraphs III, V, VIII, IX, XIV, XVI, XVII, XVIII, XIX and XX of appellant's complaint, *supra*, which clearly show a federal question and a subject matter over which the federal government has exclusive control, namely, deportation of aliens.

III.

The prior adverse ruling in the habeas corpus proceeding was not *res judicata* or a bar via estoppel for the reason that Congress provided the relief of the provisions of the Administrative Procedure Act in addition to the constitutional relief of habeas corpus because of the extreme limitations of review in the latter and its desire to insure aliens a full and complete opportunity to secure justice and avoid deportation of worthy aliens victims of error and deception.

IV.

The District Court had the power to permit the appellant right of amendment of the allegation of statutory authority for jurisdiction and to do so would have been in the interests of justice, particularly, when appellant asked permission to amend, and having the power and jurisdiction to allow amendment, it abused its discretion when it denied that right to appellant [24].

V.

The District Court erred in dissolving the temporary restraining order because in so doing it denied appellant the right to secure relief while at liberty as Congress provided.

ARGUMENT.

POINT ONE.

Habeas Corpus Not Exclusive Relief From Administrative Order of Deportation.

Denial of Habeas Corpus No Bar nor Does It Estop Relief Under Section 10 of Administrative Procedure Act.

Relief of Judicial Review of Order of Deportation Is Grant by Congress to Alien in Addition to Habeas Corpus Provided by Constitution Which Congress Cannot Suspend Under Circumstances.

Prior to the adoption of the Administrative Procedure Act of 1946 (Act of June 11, 1946, 60 Stat. 237, *et seq.*), the only legal procedure available to an alien to test the validity of an administrative order of deportation was by petition for writ of habeas corpus, *Bridges v. Wixon*, 326, U. S. 135, a right guaranteed by Art. I, Sec. 9, Clause 2, of the Constitution which reads: "The Privilege of the Writ of Habeas Corpus shall not be suspended . . ." The review, traditionally limited, primarily related to a determination of due process. *Eagles v. Samuels*, 329 U. S. 304, 311.

Sung v. McGrath, 339 U. S. 33, held that the Administrative Procedure Act, *supra*, was applicable to deportation cases. Thereupon, Congress expressed its will, intention and purpose by exempting proceedings before the immigration service from provisions of Sections 5, 7, and 8 of the Administrative Procedure Act (64 Stat. 1048), hereinafter designated as the APA for convenience of all. This exemption by Congress was in accord with Section 12 of the APA ". . . No sub-

sequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly. . . .”

Heikkila v. Barber, 345 U. S. 229, held that the APA did not apply to the provisions of the Internal Security Act of 1950 (64 Stat. 1006), because of the interpretation given the term “final” regarding the decision of the Attorney General to deport an alien. However, *Heikkila* was specifically not a ruling on the 1952 Immigration and Naturalization Act (66 Stat. 163), see *Heikkila v. Barber*, *supra*, footnote 4.

Pedreiro v. Shaughnessy, 349 U. S. 48, has held that an alien may, under the 1952 Act, secure injunctive relief under the provisions of Section 10 of the APA, *supra*. The remedy, said the Supreme Court, is an appropriate one and an alien is not limited to review by habeas corpus. It further held that the Attorney General was not an indispensable party to the action. Moreover, *Pedreiro* declared that a second action would not injure the Government, but, *sub silentio*, could abet an alien.

The foregoing brief chronology shows that we must presume that Congress originally intended to grant judicial review to aliens in accord with the APA; changed its mind by specifically withdrawing the privilege, *supra*; and, then in the 1952 Act, Congress reinstated the privilege.

It is evident that Congress had been undecided as to just which policy is in the best interest of our country and fair and proper for aliens in accord with the American policy of fair play. The fact is positive, insofar as appellant's complaint is concerned, that as of April 18,

1955, the date of its filing [10], the Supreme Court has decreed that the existing will, purpose and intention of Congress was to extend the relief of judicial review. *Pedreiro v. Shaughnessy, supra*. It follows that the trial court had jurisdiction, providing that appellant was not barred or estopped from asserting same by the prior adverse ruling on her habeas corpus petition.

When the APA was enacted in 1946, the Constitutional guarantee of habeas corpus, *supra*, was available. It was available continuously during the period when Congress was wavering in its position. It would be presumptuous for anyone to argue that Congress was unmindful of the Constitutional guarantee or that Congress intended to substitute judicial review under APA for the review required by the Constitution.

It was the intention of Congress under the 1952 Act, *supra*, to grant an alien the additional remedy of judicial review and injunctive relief under Section 10 of the APA.

The view is clear and certain from the remarks made by the co-authors of the bill, Congressman Walters and the late Senator McCarran, and we quote:

“ . . . In view of the fact that every person who is ordered deported has all of these administrative procedures available, *plus an appeal to the court, plus the right to a writ of habeas corpus . . .*”
(Emphasis added.)

Congressman Walters, 98 Cong. Rec. 4415, 4416.
“The Administrative Procedure Act is made applicable to this bill. The A.P.A. prevails now.”

Senator McCarran, 98 Cong. Rec. 5778.

Appellant's action for judicial review and injunction was filed in accord with the purpose and intention of Congress expressed both in the enacting and passage, thereof.

Said law did not suspend the right of habeas corpus, nor could it; said law did not create the situation where two remedies were available, requiring an election, nor could it; said law did not state which procedure should come first as that would have to be determined by the exigencies of each deportation matter.

It is elementary that *res judicata* does not apply to habeas corpus. *Salinger v. Lansel*, 265 U. S. 224, 230. Even when the same grounds are urged in a second petition for habeas corpus, the Supreme Court has decreed in *Wong Doo v. U. S.*, 265 U. S. 239, 241 (immigration case) that the first ruling *may properly* be given controlling weight, but the trial court to whom it is presented should be guided by a rationalization of the facts and circumstances.

Besides, where the doctrine of *res judicata* or any form of bar would be inconsistent with the expressed will of Congress (*cf. Pedreiro, supra*) or the method devised and enacted by Congress, the doctrine will not be enforced by the courts. *Denver Bldg. Trades v. N. L. R. B.*, 186 F. 2d 326; reversed on other grounds in 341 U. S. 675.

When appellant filed her complaint, she was seeking a judicial review which applied a statutory standard of review which required the reviewing court to determine from the whole record whether there was substantial evidence to warrant the order of deportation. To that

scope of review, Congress says she is entitled and the Supreme Court has approved.

Pedreiro v. Shaughnessy, supra;

Kristensen v. McGrath, 340 U. S. 162;

Universal Camera Co. v. N. L. R. B., 340 U. S. 474;

Heikkila v. Barber, 345 U. S. 229, 236.

The verity of the allegations of appellant's complaint will be established beyond question by the scope of review required under Section 10 of the Administrative Procedure Act. Truth will not injure the Government, but will make it possible for appellant to be vindicated and become a citizen of the United States for which she has been waiting since 1951 [6]. The will and intention of Congress, as expressed in the 1952 Act, should be permitted by this Court.

POINT TWO.

District Court Acted Arbitrarily in Denying Appellant's Request to Amend Complaint to Correctly Designate Statutory Authority for Jurisdiction.

The provisions of 28 U. S. C. A. 1331 declare that federal district courts shall have jurisdiction of matters arising under the laws of the United States.⁶ Deportation is a federal matter and under the laws of the United States the Attorney-General determines whom shall be

⁶28 U. S. C. A. 1331, Act of June 25, 1948, 62 Stat. 930:

"The district courts shall have original jurisdiction of all civil actions . . . under the Constitution, laws or treaties of the United States."

ordered deported. Act of June 27, 1952, 66 Stat. 204; 8 U. S. C. A. 1251.⁷

Appellant's complaint, paragraph III [4] recites that appellee is a link in the chain of immigration law enforcement under the supervision and control of the Attorney-General. Paragraph V, thereof [5], recites that there was an outstanding Order of Deportation which had been issued March 30, 1953.

We respectfully submit that such allegations cured the error in paragraph II [3] where jurisdiction is incorrectly alleged under the authority of the Declaratory Judgments Act. See, *Skelly Oil Co. v. Phillips*, 339 U. S. 667, 672.

Appellee had filed no responsive pleading and appellant was entitled to amend as a matter of course. Leave of court was not necessary and it was error to deny leave when sought.

Rule 15(a), Fed. Rules Civ. Proc., 28 U. S. C. A.,
infra;

Rogers v. Girard Trust Co., 159 F. 2d 239, 241;

Lloyd v. United Liquor Corp., 203 F. 2d 789, 793.

It is neither the purpose nor the policy of the Federal Rules of Civil Procedure to sacrifice substance to form. Their purpose is to provide an adjudication on merits rather than a determination on technicalities of procedure and form. Rule 8(a) provides "A pleading shall contain . . . (1) a short statement of the grounds upon

⁷8 U. S. C. A., Act of 1950, as amended, 64 Stat. 987:

"(a) Any alien in the United States (including an alien crewman) shall upon order of the Attorney General, be deported, who"

which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) . . .”

Rule 8(f) provides “All pleading shall be so construed as to do substantial justice.” There was no construal in the light of substantial justice when the District Court refused right to amend, dismissed complaint and refused to grant appellant's counsel twenty-four hours to apply to this Honorable Court for relief.

Rule 15(a) provides “A party . . . may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .” *Copeland Motors v. General Motors*, 199 F. 2d 566.

The District Court should have granted the application to amend because justice for a girl fighting to prove her worthiness to remain in the United States demanded it.

The Order of Dismissal is error and should be reversed.

Respectfully submitted,

JOHN P. TOBIN,

Attorney for Appellant.



APPENDIX.

Section 10 of the Administrative Procedure Act of 1946.

(3) "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"(a) Right of Review.—Any person suffering legal wrong because of any agency action or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action.

"(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitu-

tional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole proceeding or such portions thereof as may be cited by any party, and due accounts shall be taken of the rule of prejudicial error." 60 Stat. 243, 5 U. S. C. 1009.

No. 14786

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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No. 14786

IN THE

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FOR THE NINTH CIRCUIT

HALLDORA KRISTIN SIGURDSON,

Appellant,

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ALBERT DEL GUERCIO,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE.

Jurisdictional Statement.

This is an appeal by appellant, plaintiff below, from an order of the United States District Court for the Southern District of California, Central Division, dismissing the complaint in the Court below for lack of jurisdiction over the subject matter [R. 20]. Appellant alleged jurisdiction in the Court below under the provisions of Section 2201 of Title 28, United States Code [R. 3], and thereafter sought permission to amend the complaint to allege jurisdiction pursuant to the provisions of Section 10 of the Administrative Procedures Act [R. 24].

As the judgment in the Court below was a final decision, this Court has jurisdiction of the appeal pursuant to Section 1291 of Title 28, United States Code.

Statement of the Case.

On April 18, 1955, appellant filed in the Court below a pleading entitled "Complaint for Declaratory Judgment and Injunction" [R. 3], challenging an Order of Deportation dated March 30, 1953, issued by H. R. Landon, appellee's predecessor as District Director of the Immigration and Naturalization Service. The complaint alleges that appellant is to be taken into custody for purposes of deportation; that the Order of Deportation is invalid in that it was issued after a hearing before the Immigration Service in which spurious dictaphone belts were used, in which reasonable cross-examination was denied, and in which the Hearing Officer refused to comply with the administrative regulations pertaining to the conduct of the hearing [R. 8]. Appellant further alleged that a Petition for Habeas Corpus had been filed in the District Court on June 24, 1953; that the Petition was denied on July 28, 1953; that this Court affirmed the judgment on September 7, 1954; that the Supreme Court denied certiorari on January 10, 1955; and that the "Habeas [*sic*] Corpus proceeding was a denial of due process of law," in that the complete immigration file had not been filed with the Court [R. 5, 8].

Appellee Del Guercio, appearing specially for the purpose, moved to dismiss the complaint for lack of jurisdiction over the subject matter, failure to state a claim upon which relief could be granted, and failure to join indispensable parties [R. 12-16]. On May 2, 1955, the District Court (Judge William M. Byrne) granted the motion to dismiss, and judgment was entered on that day [R. 18-20].

As the Motion to Dismiss was heard and decided upon the files and records in the previous habeas corpus pro-

ceedings [R. 13], a brief summary is necessary. The previous action, *Sigurdson v. Landon et al.*, Civil No. 15648-C in the Court below and No. 13974 in this Court, was reported at 215 F. 2d 791. The denial of certiorari is reported at 75 Supreme Court 298. As the petition is quite lengthy, it will suffice to say that the allegations therein are numerous and cover the same ground as the allegations in the complaint in the instant action, other than those dealing with the habeas corpus proceeding itself. In the previous habeas corpus proceeding, the trial Court found:

“That the Immigration and Naturalization Service that conducted said hearing [the Administrative Hearing which resulted in the warrant of deportation] had jurisdiction to act.”

“That the petitioner had notice of the hearing, produced witnesses in her own behalf, and had opportunity to show that she did not come from within the classification of aliens whose deportation Congress has directed.”

“That there were no procedural irregularities at said hearing.”

“That said administrative hearing was fair.”

“That there was substantial evidence to support the warrant of deportation.” [Findings IV to VIII; typewritten record in case 13974, p. 89.]

This appeal presents only a single question.

THE SOLE ISSUE BEFORE THIS COURT IS WHETHER A PROSPECTIVE DEPORTEE, HAVING ONCE HAD JUDICIAL REVIEW OF THE DEPORTATION PROCEEDINGS THROUGH THE MEDIUM OF HABEAS CORPUS, CAN THEREAFTER MAINTAIN AN ACTION FOR JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT?

Summary of Argument.

This case is here on appeal from a judgment of the District Court dismissing a complaint seeking review of an administrative order of deportation. This Court properly may take judicial notice of the prior litigation involving this same subject matter. In the prior litigation, this Court affirmed the administrative order of deportation against appellant. *Sigurdson v. Landon* (1954), 215 F. 2d 791. Certiorari was denied. This previous decision in the habeas corpus proceeding conclusively establishes that appellant received a fair hearing and that her deportability was properly determined. It is clear from the record in the habeas corpus proceeding that appellant's renewed contentions with respect to her deportability are entirely without substance.

Appellant, to borrow a phrase from baseball, wants another turn at bat. She seeks to attack the administrative deportation order on grounds previously advanced, and disposed of, in the habeas corpus proceeding; and to challenge the judgment of the trial court in the previous proceeding on grounds disposed of by this Court on the appeal in that case. This latter attack needs no comment. Thus, the present suit is in no sense a new action. Realistically considered, it is an attempt to relitigate issues already disposed of in the prior litigation. Appellant has had a judicial review of the deportation proceedings; she cannot have another.

ARGUMENT.

I.

The Prior Litigation Was the Judicial Review Sought in This Action.

In the appendix hereto, there is reprinted the Memorandum of Decision in the case of *Cruz-Sanchez v. Robinson, et al.*, Civil No. 18785-WB in the United States District Court for the Southern District of California. Although written for a different case, the decision is one of Judge Byrne, the learned trial judge in the court below. The question presented in the *Cruz-Sanchez* case is the same as that presented in this case, and the well-considered opinion of Judge Byrne is respectfully adopted as a part of this brief. As is so well pointed out in Judge Byrne's opinion in *Cruz-Sanchez*, *the review of deportation orders issued after the effective date of the Immigration and Nationality Act of 1952 is governed by the criteria set forth in Section 242 (b)(4) of that Act (Title 8, U. S. Code, Sec. 1252(b)(4))*. It is to be noted that in the instant case the deportation proceedings commenced on October 10, 1951, when a warrant of arrest was issued by the Immigration authorities. Hearings were held and a recommended order of deportation was filed by the Hearing Officer on March 13, 1952. The Acting Assistant Commissioner certified the case to the Board of Immigration Appeals on May 26, 1952. The order of deportation did not become administratively final until March 19, 1953, when the Board dismissed the appeal. At that time, the 1952 Act was in effect.

It may be argued that, since the deportation proceedings were commenced under the prior law and appellant was found deportable on a charge under that law the saving clause (Section 405(a)) of the 1952 Act preserved the prior law. In cases involving the *form* of judicial review (as distinguished from the *scope* of review), it has been held that where final deportation order was entered prior to the effective date of the new Act, the saving clause preserved the old law which precluded non-habeas corpus judicial review.

Heikkila v. Barber, 216 F. 2d 407 (C. A. 9, 1954, concurring opinion of Judge Pope);

Ragni v. Butterfield, 115 F. Supp. 953 (E. D. Mich., 1953).

On the other hand, where, as here, the final order of deportation was not entered until after the 1952 Act took effect, the courts have held that the new Act applied, such that non-habeas corpus judicial review was not precluded.

Shaughnessy v. Pedreiro, 349 U. S. 48 (1955);

Rubinstein v. Brownell, 206 F. 2d 449 (C. A. D. C., 1953), affirmed by an equally divided court, *Brownell v. Rubinstein*, 346 U. S. 929 (1954).

This appellant might as easily have had judicial review in the first instance through other than habeas corpus proceedings.

TURNING FROM THE FORM TO THE SCOPE OF THE JUDICIAL REVIEW, WE FIND THAT APPELLANT HAS ALREADY HAD ALL THE REVIEW TO WHICH SHE MAY BE ENTITLED. THE CASES WHICH HAVE CONSIDERED THE SCOPE OF JUDICIAL REVIEW OF DEPORTATION ORDERS ENTERED AFTER THE 1952 ACT, IN HABEAS CORPUS PROCEEDINGS, HAVE APPLIED THE STANDARDS OF SECTION 242(b)(4).

Navarette-Navarette v. Landon, 223 F. 2d 234, 237 (C. A. 9, 1955);

United States ex rel. Brzovich v. Holton, 222 F. 2d 840, 842 (C. A. 7, 1955).

Surprisingly enough, the saving clause of the 1952 Act was not discussed in those cases, but it is clear that the courts applied the standards found in Section 242(b)(4) of the 1952 Act even if one were to assume that those standards differed in some respect from the standards theretofore applicable. The saving clause continues the old law only "unless otherwise specifically provided" in the new Act. The standards of 242(b)(4) are sufficiently specific to indicate that they are the ones Congress intended to apply.

See:

Marcello v. Bonds, 349 U. S. 302 (1955);

Shomberg v. United States, 348 U. S. 540 (1955).

Moreover, as discussed more fully below, Section 242(b)(4), in effect when the deportation order here involved was reviewed in habeas corpus proceedings, prescribes substantially the same criteria for both habeas corpus and non-habeas corpus judicial review as were

formerly adhered to when habeas corpus was the exclusive remedy.

The inadequacy of habeas corpus as a vehicle for review of deportation orders inheres in its form rather than in the scope it affords. Since the detention is a jurisdictional prerequisite, the alien ordered deported cannot obtain review of the order in habeas corpus proceedings until he has wound up all of his affairs and has been taken into custody for the purpose of deportation. It is for this reason that habeas corpus has been considered inadequate as a form of review.

See:

United States ex rel. Trinler v. Carusi, 166 F. 2d 457 (C. A. 3, 1948);

Pedeiro v. Shaughnessy, 213 F. 2d 768 (C. A. 2, 1954);

61 Harv. L. Rev. 1445, 1948.

However, once available as a vehicle for review, habeas corpus provides the self-same relief as that afforded by other media and that authorized by Section 10 of the Administrative Procedure Act (5 U. S. C., 1009).

Thus, for example, habeas corpus permits relief where there is an abuse of discretion or failure to exercise discretion:

Mastrapasqua v. Shaughnessy, 180 F. 2d 999 (C. A. 2, 1950);

Accardi v. Shaughnessy, 347 U. S. 260 (1954)

where there has been a failure of procedural due process:

Japanese Immigrant Case, 189 U. S. 86 (1903);

Chew v. Colding, 344 U. S. 590 (1953)

where statutory authority has been misconstrued:

Barber v. Gonzales, 347 U. S. 637 (1954);

Gegiw v. Uhl, 239 U. S. 3 (1915)

where there has been a failure to observe the procedure required by law:

Bridges v. Wixon, 326 U. S. 135 (1945);

Wong Yang Sung v. McGrath, 339 U. S. 33 (1950).

Where the facts are subject to trial *de novo*, as where a substantial claim to citizenship is involved, habeas corpus permits such trial *de novo*:

Ng Fung Ho v. White, 259 U. S. 276 (1922).

The area in which there has been some difficulty in the past concerns assay of the evidence to determine whether it supports the administrative fact findings. Judicial review of a deportation order is limited to a review of administrative record, whether the form of review be habeas corpus or otherwise. Section 10(e) of the Administrative Procedure Act authorized judicial intercession where the agency's findings are unsupported by substantial evidence. Some courts have indicated the scope of inquiry on habeas corpus as somewhat narrower.

See:

Heikkila v. Barber, 345 U. S. 229 (1953).

Although the statutes and regulations preceding the 1952 Act did not define the government's burden of proof in a deportation case, the courts did. While holding that on habeas corpus review of deportation orders, they could not weigh the evidence, the courts ruled uniformly

that a mere scintilla of evidence is not enough. The formulae applied by the courts vary at least in terms.¹ Some of the earlier cases held it sufficient if there were "some" evidence to support the administrative finding.

See:

United States ex rel. Vajtauer v. Commissioner,
272 U. S. 103 (1927).

Later cases have been more exacting. In *Bridges v. Wixon*, *supra*, the deportation order was set aside because, among other things, it was not based on "probative" evidence, 326 U. S. 135, 152. Other cases, even prior to the 1952 Act, applied the "substantial evidence" test.

Maita v. Haff, 116 F. 2d 337, 338 (C. A. 9, 1940);

Kielema v. Crossman, 103 F. 2d 292, 293 (C. A. 5, 1939);

Daskaloff v. Zurbrick, 103 F. 2d 579 (C. A. 6, 1939);

Morrow v. Tillinghast, 35 F. 2d 183, 184 (C. A. 1, 1929);

Palmer v. Ultimo, 69 F. 2d 1, 2 (C. A. 7, 1934);

United States ex. rel. Schlimgen v. Jordan, 164 F. 2d 633, 634 (C. A. 7, 1947).

It would thus appear that even before passage of the 1952 Act the courts have required, on habeas corpus

¹"Since the precise way in which the courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms." (*Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, 489 (1951).)

review of deportation orders, the same evidentiary standards as were required in non-habeas corpus judicial review of administrative determinations of other agencies. In framing the evidentiary requirements of Section 242 (b)(4), Congress did not consider that it was setting up new standards. The bills which culminated in the 1952 Act emerged from a detailed and intensive study of our Immigration and Naturalization systems made by the Senate Judiciary Committee, S. Rep. No. 1515, 81 Cong. 2d Sess. (1950). In summarizing the then existing law on judicial review, the Committee stated (p. 629):

“In a habeas corpus proceeding, based on a deportation case, the Court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation.”

As stated earlier, Section 242(b)(4) sets up the criteria applicable to review of all deportation orders entered after the 1952 Act took effect. In such cases, of which this case is one, it matters little whether the form of review is habeas corpus or any other convenient form. As the Court of Appeals for the Seventh Circuit stated in *United States ex rel. Brzovich v. Holton*, *supra*, at page 841:

“We think that our scope of review is the same, irrespective of which procedure is employed.”

See also, 66 Harvard Law Review 643, 702:

“It should be pointed out, however, that the scope of review under other forms of relief permitted by the APA is apparently no broader than that which eventually would be available under habeas corpus.”

Therefore, it can be seen that appellant here seeks again that which she once has had. The scope of review in this second proceeding would be the same as that had in the previous habeas corpus proceeding. Indeed, the findings of fact in the previous habeas corpus proceeding, while not in the very words of Section 242(b)(4), are unquestionably findings satisfying the criteria set forth therein.²

II.

Prior Litigation Conclusively Establishes Appellant's Deportability.

Appellant points out that the doctrine of *res judicata* does not apply to habeas corpus cases. The cited cases involve an existing habeas corpus case, and its relationship to a prior habeas corpus case. They are not applicable because the present cause is not a habeas corpus proceeding, but is rather a declaratory judgment action. The case of *Lapides v. Clark*, 176 F. 2d 619, 85 App. D. C. 101 (1949), cert. denied, 338 U. S. 860, is directly in point. In that case, the plaintiff had instituted habeas

²In the findings, the Court found that the order of deportation was supported by "substantial evidence," rather than the "reasonable, probative and substantial evidence" as stated in Section 242 (b)(4). The words "reasonable" and "probative" add nothing; see footnote 1.

"A decision of a court, a jury, or an administrative agency, which is unsupported by substantial evidence, is, of course, arbitrary and capricious and may always be set aside on review; but, if the decision has a rational and substantial basis in the evidence and the law, it may not be nullified by a reviewing court, even though that court is of the opinion that it would have reached a different conclusion had it tried the case."

N. L. R. B. v. Minnesota Mining and Manufacturing Company, 179 F. 2d 323, 326 (C. A. 8, 1950).

corpus proceedings and the cause had ultimately been determined adversely to him in the Court of Appeals for the Second Circuit. He subsequently brought a declaratory judgment action in the District of Columbia, seeking essentially the same relief. The District Court dismissed the complaint, and was affirmed on appeal. The court said at page 621:

“In the foregoing case, and in this, there is a virtual identity of parties and allowable issues. The purpose of each was to secure a determination that appellant is a citizen, to the end that he might obtain release from his present detention and be allowed to enter the country as a citizen. Obviously, he could have attacked the constitutionality of the Act in the habeas corpus proceedings. Had he done so, and prevailed, that would have proven a simple and speedy method of accomplishing his objectives. Evidently sensing that *res judicata* might apply, he cites here *Collins v. Loisel*, 262 U. S. 426, 43 S. Ct. 618, 67 L. Ed. 1062, and *Wong Doo v. United States*, 265 U. S. 239, 44 S. Ct. 524, 68 L. Ed. 999, as authority for the proposition that the doctrine does not apply as to habeas corpus cases, overlooking the fact that the present action is for a declaratory judgment. We wonder what justification there can be for this additional and needless litigation with all its trouble, expense and delay, which the law so much abhors. [Citing cases.] In view of the granting of the motion to dismiss the complaint, the respondents did not answer. That probably accounts for the fact that the habeas corpus case was not pleaded in bar of the present action. Yet evidence of that case is in the complaint itself. However, in view of the peculiar situation, we do not pass upon the ques-

tion. Yet, we do think, under the circumstances, that great weight should be given the conclusion of the court in the New York case.”

Indeed, the decision of this court in *Heikkila v. Barber*, 216 F. 2d 407 (1954), cert. denied, 349 U. S. 927, is applicable here. Heikkila had originally brought a declaratory judgment action to have an order of deportation declared invalid, and was unsuccessful, *Heikkila v. Barber*, 345 U. S. 229 (1953). A second declaratory judgment action was thereafter filed. This court said at page 409 of 216 F. 2d:

“Appellant’s present suit is in no real sense a new action. It is but a repetition or continuation of the litigation theretofore unsuccessfully urged. We have no alternative but to hold that the earlier decision of the Supreme Court is *res judicata*.”

Here, too, appellant is but attempting to repeat or continue the litigation which she heretofore unsuccessfully waged. Although this is not a second declaratory judgment action, it is clear that declaratory relief, in the usual sense, is not involved in either of appellant’s cases. The purpose of the action is to review the administrative fact findings supporting an order of deportation. As was pointed out in the first portion of this argument, the *form* of the action is immaterial. Whatever the form, the prospective deportee receives judicial review, according to the criteria set forth in Section 242(b)(4), of the administrative record.

Conclusion.

By reason of the foregoing, it is respectfully submitted that the order of the District Court dismissing appellant's complaint should be affirmed.

LAUGHLIN E. WATERS,

United States Attorney,

MAX F. DEUTZ,

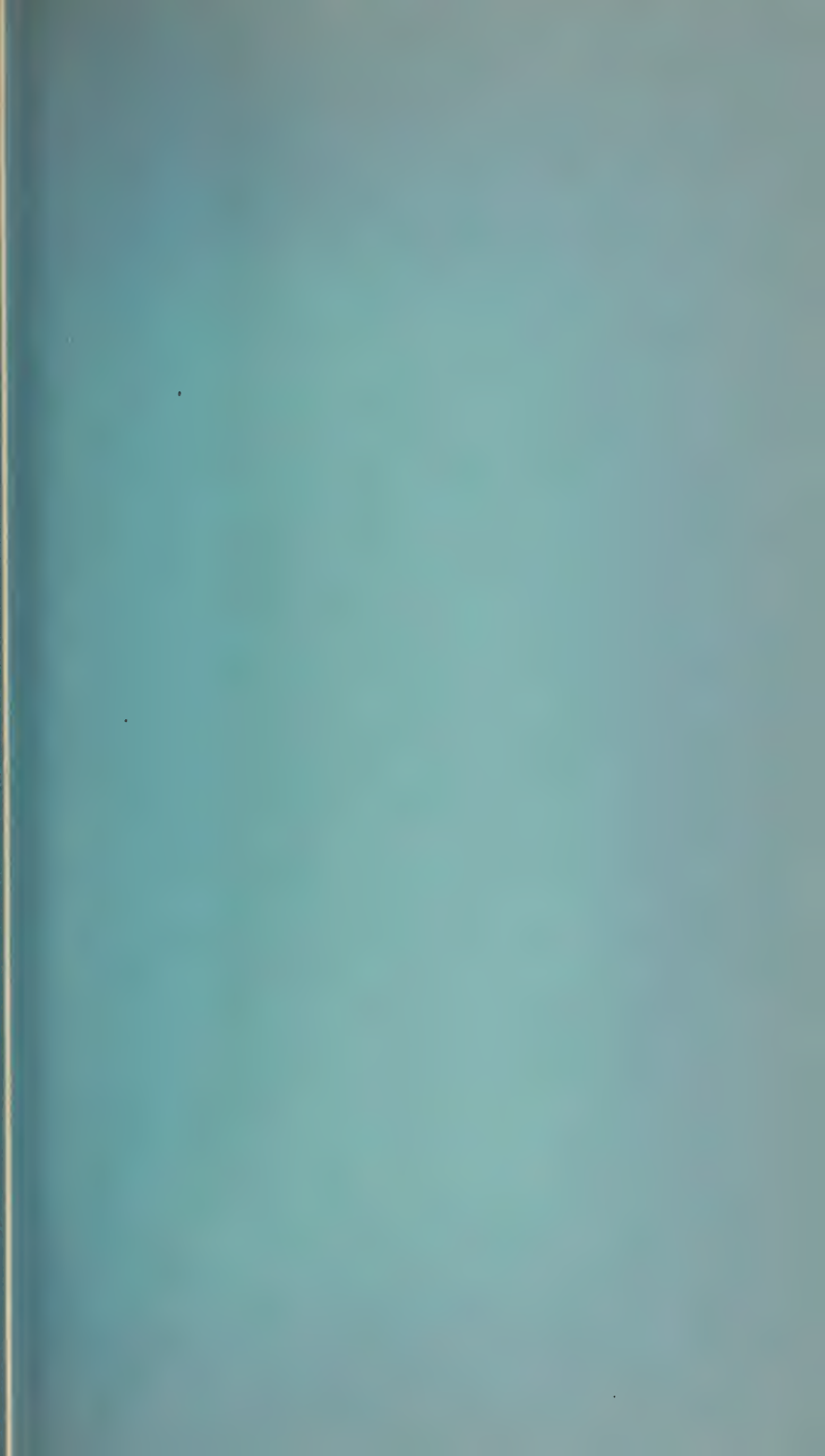
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of Civil Division,*

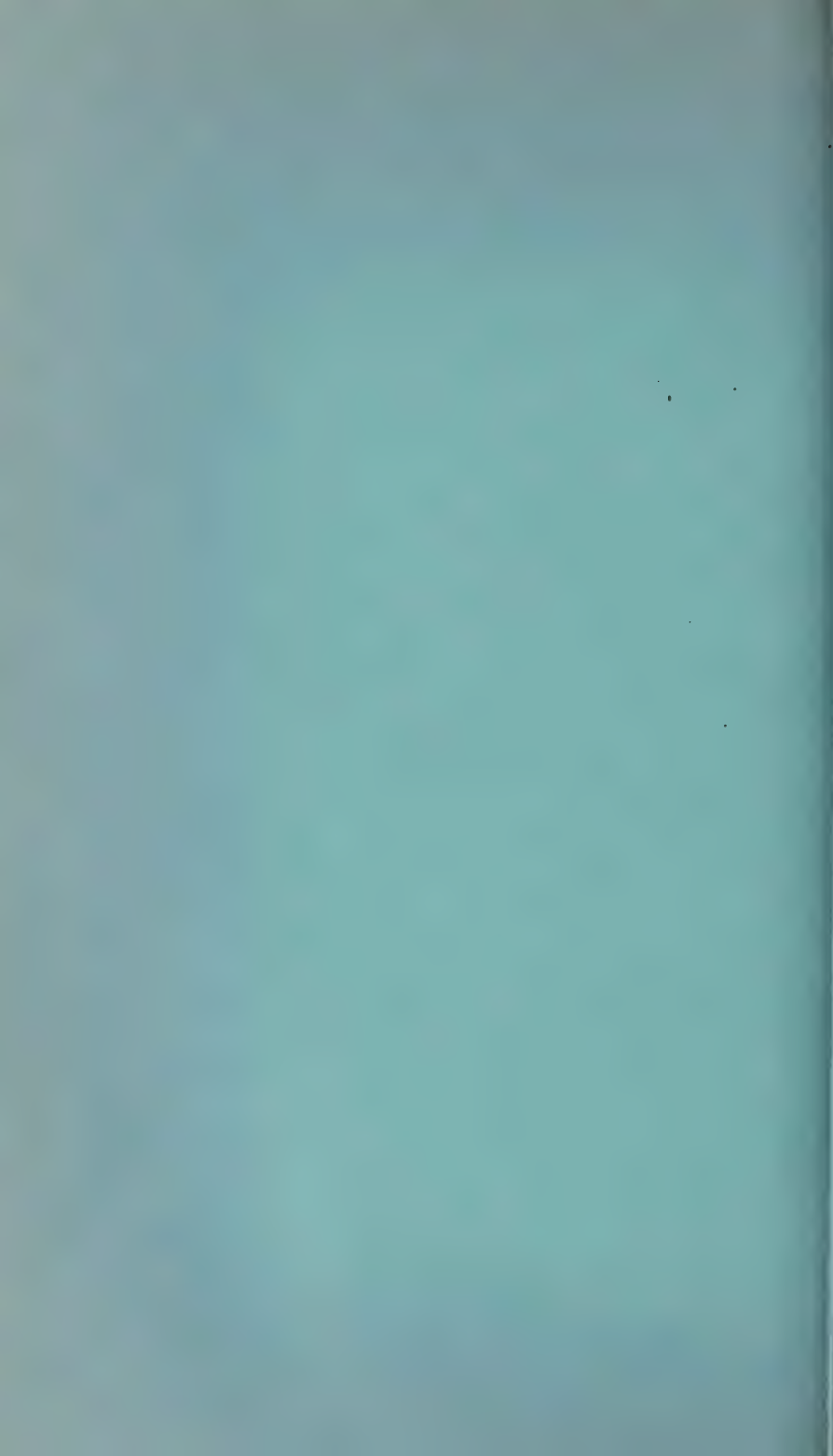
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By ANDREW J. WEISZ,

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APPENDIX.

United States District Court, Southern District of California, Central Division.

Received November 17, 1955, U. S. Attorney, Los Angeles, California.

Leonard Cruz-Sanchez, Petitioner, vs. Robert Robinson, Officer in Charge, Immigration and Naturalization Service, Los Angeles, California, Merrill O'Toole, Regional Commissioner, San Pedro, California, Respondents.

Filed: November 17 1955. Clerk, U. S. District Court, Southern District of California, By....., Deputy Clerk. No. 17875-WB.

Memorandum of Decision.

Cruz-Sanchez filed this action for declaratory judgment seeking the review of a final order of the Immigration and Naturalization Service in which he was found to be a deportable alien and ordered deported from the United States.

The defendants, in their motion to dismiss, concede that an action for declaratory judgment is a proper form of proceeding to obtain judicial review of an order of deportation,¹ but they contend that no relief can be granted here as the claim of the plaintiff has previously been adjudicated, *i. e.*, he has already had his judicial review.

Approximately two months prior to the filing of this action the plaintiff filed a petition for a writ of habeas corpus and was accorded a judicial review of the deporta-

¹Shaughnessy v. Pedreiro, 349 U. S. 48.

tion proceedings he attacks in the present suit. Following a hearing on the writ and the return thereto, the court made and filed findings that the hearing and the final order of deportation complied with the conditions and provisions of Section 242(b) of the Immigration and Nationality Act (8 U. S. C. A. 1252(b)) that the deportation proceedings relating to the plaintiff were fair and in accord with his constitutional rights; that there was reasonable, substantial and probative evidence to support the decision of deportability, the order of deportation and the warrant of deportation. Accordingly judgment was entered discharging the writ.

The question here is whether Cruz-Sanchez may have a re-determination of the same issues previously adjudicated. He relies on *Shaughnessy v. Pedreiro*, 349 U. S. 48, and contends that it authorizes judicial review in both habeas corpus and declaratory relief and therefore he is entitled to *two judicial* reviews of the same administrative proceeding. That is not the holding of the *Pedreiro* case. The *Pedreiro* court held "that there is a right of judicial review of deportation orders other than by habeas corpus" and that an action for declaratory relief is an appropriate remedy to obtain such a review. The clear holdings is that judicial review may be had *either* by habeas corpus *or* an action for declaratory relief. The Administrative Procedure Act provides² the "form of proceeding for judicial review shall be . . . any

²⁵ U. S. C. A. 1009(b).

applicable form of legal action (including actions for declaratory judgments or writs for prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction." It could hardly be contended that Congress intended to permit successive judicial reviews of the same administrative action in each of the various forms authorized, with resultant endless litigation and the indefinite postponement of execution of the administrative order. The conclusion is inescapable that Congress intended but one judicial review of administrative action.

Cruz-Sanchez says it is elementary that the doctrine of *res judicata* does not apply to habeas corpus. That is a correct statement of the law³ which is founded upon the recognition of habeas corpus as the privileged writ of freedom. It is because of this status that courts are not foreclosed from considering successive applications for the extraordinary writ.⁴ However, we are not concerned

³Wong Doo v. United States, 265 U. S. 239; Salinger v. Loisel, 265 U. S. 224; Collins v. Loisel, 262 U. S. 426.

⁴To curtail the abuse of the writ, Congress in 1943 adopted Section 2244 of Title 28 U. S. C. A. reading as follows:

"No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry." (See Revisor's Note to the effect that the purpose of the section is to prevent suing out successive and repitious writs).

with the application of the doctrine of *res judicata* to habeas corpus proceedings. This is an action for a declaratory judgment and not an application for the Great Writ.

Ordinarily the office of habeas corpus is exhausted when it is ascertained that the agency or court under whose order the petitioner is being held had jurisdiction to act and the requirements of due process were observed.⁵ Judicial review of an administrative proceeding may be had in habeas corpus because the Administrative Procedure Act so provides (5 U. S. C. 1099(b)) and the scope of habeas corpus is enlarged accordingly. The scope of judicial review of deportation proceedings whether invoked by habeas corpus or an action for declaratory relief is delineated by section 242(b) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1252(b)). See *Marcello v. Bonds*, 349 U. S. 302. Section 242(b) sets forth various requirements with respect to notice, right to counsel, right to present evidence and to cross-examine witnesses and provides that decisions of deportability shall be based upon reasonable, substantial and probative evidence. The scope of the review is exactly the same whether the remedy pursued is habeas corpus or an action for declaratory relief.

The plaintiff has been afforded judicial review and a court of competent jurisdiction has determined that the deportation proceedings complied with the conditions and

⁵*Woolsey v. Best*, 299 U. S. 1.

provisions of Section 242(b). A judgment rendered by a court having jurisdiction of the parties and subject matter is conclusive and indisputable evidence as to all rights, questions, or facts put in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies.⁶

Although the defense of *res judicata* should ordinarily be pleaded; where, as here, the complaint on its face shows the prior proceedings, such defense may be presented by motion to dismiss.⁷

An alien is not entitled to repetitious judicial reviews of deportation proceedings. If discontented with the result of the first judicial review, his remedy is by appeal. The motion to dismiss is granted. Counsel for defendant to prepare, serve and lodge a formal order pursuant to local rule 7.

Dated, Los Angeles, California, November 17, 1955.

WM. M. BYRNE,

United States District Judge.

⁶Wyoming v. Colorado, 286 U. S. 494; Continental Oil Co. v. Jones, 176 F. 2d 519; Oklahoma v. United States, 155 F. 2d 496; Restatement, Judgments, 568.

⁷Cuff v. United States, 64 F. 2d 624.

Statutes and Regulations and the Statutes Involved.

Section 242 of the Immigration and Nationality Act of 1952 (8 U. S. C., Sec. 1252), so far as pertinent hereto, provides:

242. Apprehension and Deportation of Aliens . . .

* * * * *

Proceedings before a Special Inquiry Officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, the Attorney General shall prescribe. Such regulations shall include requirements that . . .

- (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;
- (2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;
- (3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and
- (4) No decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence.

Section 405 of the Immigration and Nationality Act of 1952 (Footnote, 8 U. S. C., Sec. 1101), so far as pertinent hereto provides:

“(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect

the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [so in original; probably should read "statutes"], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect."

Section 10 of the Administrative Procedure Act (5 U. S. C., Sec. 1009), so far as pertinent hereto provides:

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

No. 14786

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HALLDORA KRISTIN SIGURDSON,

Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

JOHN P. TOBIN,

1120 Guaranty Building,
Hollywood 28, California,

Attorney for Appellant.

FILE

DEC 17 1955

PAUL P. O'BRIEN, C

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No. 14786

IN THE

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Appellant,

vs.

ALBERT DEL GUERCIO,

Appellee.

Appeal From the United States District Court for the
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APPELLANT'S REPLY BRIEF.

Reply to Appellee's Point One.

Appellant in her opening brief, page 13, shows that the Supreme Court in *Pedreiro v. Shaughnessy*, 349 U. S. 48, recognized that the intent of the framers of the 1952 Act and of Congress was to grant the additional relief of judicial review to aliens facing an order of deportation.

Heikkila v. Barber, 345 U. S. 229, 235, 236, has shown that the Supreme Court considers habeas corpus as a constitutional remedy limited to the traditional question of due process and indicates conclusively that

“ . . . it is the scope of inquiry on habeas corpus that differentiates use of the writ from judicial review as that term is used in Administrative Procedure Act.”

Heikkila, supra, 236.

The narrow scope of inquiry is set forth in *Eagles v. Samuels*, 329 U. S. 304, 311, quoted with approval and followed by this Court in our former appeal of *Sigurdson v. Landon*, 215 F. 2d 791, 796. The following from *Eagles, supra*, 311, shows with unerring clarity that even then the Supreme Court observed and considered as binding the difference in the scope of review:

“Congress made the decisions of the local boards and of the boards of appeal ‘final,’ except as appeals from them may be authorized . . . *withholding from the courts the customary power of review of administrative action.* See, *Estep v. U. S.*, 327 U. S. 114.” (Emphasis added.)

As was so aptly pointed out in 51 Columbia Law Review 1064, 1066, the most important effect of use of APA in deportation cases is the broadening of the scope of review. While it is true that *United States v. Holton*, 222 F. 2d 840, 841, considers the scope of review in APA action and writ action as the same, that latter decision was not called upon to decide the fact. The statement is dicta. The lower court was apparently reversed on the habeas corpus principles of due process. Direct attack was unnecessary to secure a reversal there.

But, in our case a direct attack is necessary and now permissible.

Heikkila, supra;

Pedreiro, supra.

As we said in our opening brief, page 15, the verity of the appellant's complaint will be established by the scope of review now allowed us under the APA. We can and will show from the whole record that eight dictaphone belts were used and employed to make the statement taken from

appellant, yet only five belts were required to record a playback of the statement introduced at her deportation hearing. Three belts were never made part of record despite objection of appellant nor were they ever made part of record in the habeas corpus proceedings despite appellant's efforts and demands. Three belts were added to record in habeas corpus proceedings, but one of the three belts was made subsequent to appellant's deportation hearing and constituted a fraud upon the trial court in the former proceeding and this is a matter of record in that proceeding.

Moreover, we can and will establish that the Government's own dictaphone experts testified that a playback should show a multiplicity of "clicks" to indicate numerous starting and stopping of the dictaphone. The playback revealed one "click."

Appellant can and will prove under the direct attack permitted under APA that her other allegations are equally true.

The case of *Cruz-Sanchez* set forth in the appendix of appellee's brief attempts to substitute its opinion what Congress intended instead of accepting the statements of the authors of the 1952 Act. Supreme Court in *Pedreiro, supra*, page 52, accepted the legislative intent as expressed by the authors of the law (App. Op. Br. p. 13). *Cruz-Sanchez* gives no consideration to the Supreme Court expressions as to difference between writ and APA review in scope and meaning of judicial review as set forth in *Heikkila, supra*.

Reply to Appellee's Point Two.

Lapides v. Clark, 176 F. 2d 619, was decided in 1949. The appellant is acting under a right granted by the 1952 Act. However, a short quote from *Lapides* is in point here. It is found on page 13 of appellee's brief. It is:

“ . . . We wonder what justification there can be for this *additional* and needless litigation with all its trouble, *expense* and delay, which the law so much abhors. . . .” (Emphasis supplied.)

Our answer to that is that Congress was aware of possibilities of injustice under habeas corpus and gave alien right to make direct attack to prove gross improprieties, such as we endeavor to have the opportunity to prove.

The *Heikkila* proceedings (Appellee's Br. p. 14), is not in point. There the order of deportation was made prior to 1952 Act. There never existed a cause of action.

Summary.

Appellant has shown that the Supreme Court in *Pedreiro, supra*, has decreed that it was the intent of Congress in enacting the 1952 Act to grant to aliens the right of judicial review of deportation orders.

Appellant has shown that the Supreme Court in *Heikkila, supra*, has declared that habeas corpus is not judicial review as that term is employed in the Administrative Procedure Act.

Appellant has shown that habeas corpus is a constitutional examination, traditionally limited in its scope of review, and that Congress gave aliens the additional remedy of judicial review, not only as a means of avoiding incarceration, but previously as a means of permitting

worthy aliens to prove their right to remain in the United States in accordance with the American principles of justice, decency and honor.

Appellant is fighting for that opportunity and appeals to this Court to grant same by reversing lower court's decision.

Respectfully submitted,

JOHN P. TOBIN,

Attorney for Appellant.

No. 14787

United States
Court of Appeals
for the Ninth Circuit

RICHARD WAYNE FRANK, Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

AUG 31 1955

PAUL P. O'BRIEN, CLERK

No. 14787

United States
Court of Appeals
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RICHARD WAYNE FRANK, Appellant,
vs.
UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 South Spring Street,
Los Angeles 12, California.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant United States Attorney
Chief of Criminal Division;

CECIL HICKS, JR.,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, South-
ern District of California, Central Division
September, 1954, Grand Jury

No. 24043—CD

UNITED STATES OF AMERICA,
Plaintiff,
vs.
RICHARD WAYNE FRANK,
Defendant.

INDICTMENT

(U.S.C., Title 50 App., 462—Universal Military
Training and Service Act)

The Grand Jury charges:

Count One (U.S.C., Title 50 App. 462)

Defendant Richard Wayne Frank, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 31, said board being then and there duly created and acting under the Selective Service System established by said Act, in Contra Costa County, California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-O and was notified of said classification; on February 10, 1954, said defendant was ordered to report for civilian work contributing to the maintenance of the national health, safety and interest on

February 23, 1954, at the County of Los Angeles Department of Charities, 1100 North Mission Road, Los Angeles 33, California; on or about February 23, 1954, in Los Angeles County, California, within the Central [2] Division of the Southern District of California, the defendant did knowingly and wilfully refuse to accept said employment and by the aforesaid conduct the defendant did knowingly and wilfully fail and neglect to perform a duty required of him under the said Act and the regulations promulgated thereunder. [3]

Count Two (U.S.C., Title 50 App., 462)

Defendant Richard Wayne Frank, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 31, said board being then and there duly created and acting under the Selective Service System established by said Act, in Contra Costa County, California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class 1-O and was notified of said classification; on June 1, 1954, said defendant was ordered to report for civilian work contributing to the maintenance of the national health, safety and interest on June 11, 1954 at the County of Los Angeles Department of Charities, 1100 North Mission Road, Los Angeles, California; on or about June 18, 1954, in Los Angeles County, California, within the Central Division of the Southern District of California, the de-

fendant did knowingly and wilfully refuse to accept said employment and by the aforesaid conduct the defendant did knowingly and wilfully fail and neglect to perform a duty required of him under the said Act and the regulations promulgated thereunder.

A True Bill.

/s/ W. H. REPLOGE,

Foreman

/s/ LAUGHLIN E. WATERS,

United States Attorney [4]

[Endorsed]: Filed January 12, 1955.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and Richard Wayne Frank, Defendant, in the above entitled matter, through their respective counsel, as follows:

That it be deemed that the Clerk of Local Board No. 31 was called, sworn and testified that:

1. She is a clerk employed by the Selective Service System of the United States Government.

2. The defendant, Richard Wayne Frank, is a registrant of Local Board No. 31.

3. As Clerk of Local Board No. 31, is legal custodian of the original Selective Service file of Richard Wayne Frank.

4. The Selective Service file of Richard Wayne Frank is a record kept in the normal course of business by Local Board No. 31, and it is the normal course of Local Board No. 31's business to keep such records. [5]

It Is Further Stipulated that a photostatic copy of the original Selective Service file of Richard Wayne Frank, marked "Government's Exhibit 1" for identification, is a true and accurate copy of the contents of the original Selective Service file on Richard Wayne Frank.

It Is Further Stipulated that a photostatic copy of the Selective Service file of Richard Wayne Frank, marked "Government's Exhibit 1" for identification, may be introduced in evidence in lieu of the original Selective Service file of Richard Wayne Frank.

Dated this 1st day of March, 1955.

LAUGHLIN E. WATERS,

United States Attorney

LOUIS LEE ABBOTT,

Asst. U. S. Attorney, Chief of
Criminal Division

/s/ CECIL HICKS, JR.,

Asst. U. S. Attorney,

Attorneys for Plaintiff

/s/ J. B. TIETZ,

Attorney for Defendant

/s/ RICHARD WAYNE FRANK,

Defendant

It Is So Ordered this 2nd day of March, 1955.

/s/ ERNEST A. TOLIN,

United States District Judge [6]

[Endorsed]: Filed March 2, 1955.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL

May It Please the Court:

Now comes the defendant and moves the court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

3. The denial of the ministerial classification is illegal, arbitrary and capricious because the draft boards employed artificial standards in determining what constitutes a minister of religion within the meaning of the Act and Regulations; and they did not follow the definition of the term used in the Act and Regulations [7] in determining the claim of the defendant as a minister of religion.

4. The denial of the ministerial classification by the draft boards was arbitrary and capricious in that they held that the performance of secular work by the defendant, alone, without determining whether it was his avocation and used his perform-

ance of secular work to defeat illegally his ministerial status because the undisputed evidence showed that he is not engaged in secular work as a main business but only incidentally to his main work of the ministry, and that, according to the Act and Regulations he is regularly and customarily engaged in teaching and preaching the doctrines and principles of a recognized church and pursues such preaching work as his vocation and does not preach incidentally to the performance of any secular work; and therefore the draft board order is illegal, contrary to law and without basis in fact.

5. The denial of the claim for exemption as a minister of religion by all of the draft boards, and each of them, is without basis in fact, arbitrary, capricious and contrary to law.

6. The order of the local board for defendant to perform civilian work at Los Angeles Department of Charities, Los Angeles, and sections 1660.1 and 1660.20 of the Selective Service regulations are in conflict with the Act, because the work is not national or federal work as required by the Universal Military Training and Service Act.

7. The Act, as construed and applied by the regulations and the order, calls for a private non-federal labor draft for the performance of services that are not exceptional or related to the National defense, in violation of the Thirteenth Amendment to the United States Constitution.

8. The Act, as construed and applied by the regulation and order, is unconstitutional because it

deprives the defendant of due process of law contrary to the Fifth Amendment to the Constitution.

9. Section 462 (a) of the Act, Part 1660 of the regulation insofar as they have been construed and applied to the defendant are an unreasonable abridgment of his right of property contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

10. Sections 1660.20 (d) and 1660.30 of Part 1660 of the Regulations are contrary to the First, Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

11. The State Director usurped the authority of the Director contrary to the regulations.

12. There was no evidence that the work to which the Selective Service System assigned the defendant met the requirement of the law.

13. Defendant was denied procedural due process in that the local board failed to have available an Adviser to Registrants and to have posted conspicuously or any place, the names and addresses of such adviser, as required by the Regulations, and to defendant's prejudice.

14. The local board abused its discretion by arbitrarily refusing to grant defendant an Appearance Before Local Board, in December 1951 when he personally presented a written request for the appearance.

15. The defendant was denied procedural due process in that the local board failed to forward his file to the Appeal Board in December 1951 when his request for the Appearance Before Local Board

was denied and his excuse for late filing was not accepted.

16. The defendant was denied procedural due process in that the Selective Service System did not comply with its regulation §1660.20. [9]

17. The defendant was denied due process when the local board arbitrarily refused to reopen his classification on and after December 17, 1951 when he presented new evidence not previously considered, which if true, required a reclassification.

18. The defendant was denied due process when the Appeal Agent did not take an administrative appeal for defendant in December 1951.

March 1, 1955.

Respectfully submitted,

/s/ J. B. TIETZ

[10]

[Endorsed]: Filed March 3, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 24,043—Criminal

UNITED STATES OF AMERICA

vs.

RICHARD WAYNE FRANK

JUDGMENT AND COMMITMENT

On this 3rd day of March, 1955, came the attorney for the government and the defendant appeared in person and by J. B. Tietz, Esq., his attorney,

It Is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a finding of Guilty of the offenses of defendant being a male person within the class made subject to selective service under the Universal Military Training and Service Act, defendant being classified in Class 1-O, on Feb. 10, 1954 defendant was ordered to report for civilian work at the County of Los Angeles Department of Charities, and on or about Feb. 23, 1954, in Los Angeles County, California, defendant did knowingly and wilfully refuse to accept said employment; on June 1, 1954, defendant was ordered to report for civilian work at the County of Los Angeles Department of Charities, and on or about June 18, 1954, in Los Angeles County, California, defendant did knowingly and wilfully refuse to accept said employment and by the aforesaid conduct of the defendant he did knowingly and wilfully fail and neglect to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder, in violation of U.S.C., Title 50 App., 462, as charged in Counts 1 and 2 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for

a period of four (4) years on Count 1, execution of sentence is suspended and the defendant is placed on probation for a period of three years on condition the defendant enters into civilian employment of the type contributing to the national health, safety and interest, It Is Further Ordered the defendant be so employed ten days from this date in an institution that renders the type of service the defendant was directed to enter as ordered by his Local Draft Board. During the period of probation the employment of the defendant as ordered, will be for three years.

It Is Adjudged that imposition of sentence on Count 2 is suspended and the defendant is placed on probation for a period of two years. Probation on Count 2 to commence and run upon expiration of probation on Count 1. Conditions of probation on Count 2 is obedience to all laws and all rules and regulations of the Probation Office.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ERNEST A. TOLIN,

United States District Judge

/s/ WM. A. WHITE,

Deputy Clerk

[11]

[Endorsed]: Filed March 3, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, Richard Wayne Frank, resides at 5473 Clayton Road, Concord, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C. Title 50 App. Sec. 462—Selective Service Act, 1948, as amended.

On March 3, 1955, after a verdict of Guilty on both counts, the Court sentenced the Appellant, on the first count, to confinement in an institution to be selected by the Attorney General, for four years, suspended execution of said sentence and placed defendant on probation for a term of three years (with certain selective service type employment conditions) and gave defendant a probationary sentence of two years on the second count.

I, J. B. Tietz, appellant's attorney being authorized by [12] him to perfect an appeal do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

/s/ J. B. TIETZ,

Attorney for Appellant [13]

[Endorsed]: Filed March 3, 1955.

[Title of District Court and Cause.]

EXTENSION OF TIME

For good cause shown, defendant is hereby given 60 additional days, to and including June 11, 1955, to prepare and docket the record on appeal.

Dated: April 5, 1955.

/s/ LEON R. YANKWICH,
Judge

The appellee stipulates to the above requested extension of time, being assured by counsel it will be sufficient.

LAUGHLIN E. WATERS,
United States Attorney
/s/ By CECIL HICKS, JR.,
Asst. U. S. Attorney [14]

[Endorsed]: Filed April 5, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The following are hereby designated as the record which is material to the proper consideration of the Appeal filed by Richard Wayne Frank, in the above entitled cause:

1. Indictment.
2. Reporter's Transcript (as requested of Reporter).

3. All Exhibits in evidence or proffered are to be transmitted to the Court of Appeals.

4. Notice of Appeal.

5. Designation of Record.

6. All Stipulations.

7. All written motions.

/s/ J. B. TIETZ,

Attorney for Appellant [15]

Affidavit of Service by Mail attached. [16]

[Endorsed]: Filed May 26, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages number 1 to 16, inclusive, contain the original Indictment; Stipulation; Motion for Judgment of Acquittal; Judgment and Commitment; Notice of Appeal; Extension of Time; Designation of Record; which, together with a full, true and correct copy of one volume of Reporter's Transcript of Proceedings had on March 2, 1955; and Plaintiff's Exhibit 1; all in said cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 9th day of June, 1955.

[Seal] JOHN A. CHILDRESS,

Clerk

/s/ By CHARLES E. JONES,

Deputy

In the United States District Court for the Southern District of California, Central Division

No. 24,043—Cr.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

RICHARD WAYNE FRANK.

Defendant.

REPORTER'S PARTIAL TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California, March 2, 1955

Before: Honorable Ernest A. Tolin, Judge presiding.

Appearances: For the Plaintiff: Laughlin E. Waters, United States Attorney, by Cecil Hicks, Jr., Assistant United States Attorney, 600 Federal Bldg., Los Angeles, Calif. For the Defendant: J. B. Tietz, 257 So. Spring St., Suite 534, Los Angeles, Calif. [1*]

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

* * * * *

Mr. Tietz: Mr. Frank, will you please step around and take the witness stand.

RICHARD WAYNE FRANK

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Tietz): You are Richard Wayne Frank? A. Yes.

Q. You are the defendant in this case, are you not? A. Yes.

Q. When you were being processed by local Board No. 31 of the California Selective Service System, did you have occasion to visit the Board office? A. Yes.

Q. Frequently or just once or twice?

A. Quite a few times.

Q. Did you have occasion when you were in the local Board office to take a look at the bulletin board? A. Yes.

Q. Did you ever see on the bulletin board a notice saying the names and addresses of advisers to registrants [2] who would give you free service?

A. No.

Q. In June of 1954—I believe the date is June 14th, rather than June 18th, as stated in Count Two of the Indictment—you went to the Los Angeles County Department of Charities, pursuant to an order given you at your local Board office on June 11, 1954, did you not?

(Testimony of Richard Wayne Frank.)

A. Yes, I went there.

Q. Did you talk to a Mrs. Pettijohn there, as you reported to your local Board by a letter, which is sheet or page 161 of the Selective Service File?

A. Yes, I talked to her.

Q. You state in your letter, "I reported to the Los Angeles Department of Charities as directed and spoke to a Mrs. Pettijohn, who told me that they had stopped taking I-O applicants * * *"

She told you that?

A. Yes.

Q. You had some discusison with her as to what kind of jobs they had, if they did take I-O applicants, did you not?

A. Yes, I did.

Q. Now, in the early and middle part of 1951 I believe you had what was then called the IV-E classification.

A. Yes. [3]

Q. And the law changed and it became the I-O classification in the fall of '51 and they sent you a I-O classification card?

A. Yes.

Q. Did you want that I-O?

A. No.

Q. What did you want?

A. I wanted a minister's classification.

Q. You knew that was IV-D in 1948 and you told them that in 1948 and every opportunity thereafter, did you not?

A. Yes, I did.

Q. When you got that I-O, and because of the change in the law you then became obligated to perform 24 months of work away from your ministry. What did you do?

A. I asked for a personal appearance.

(Testimony of Richard Wayne Frank.)

Q. Why did you do that?

A. So I could get my IV-D classification.

Q. How did you know about that? Did you get a notice—strike that.

You received a postcard from the local Board that told you about your I-O classification in November of 1951, did you not? A. Yes.

Q. And that postcard had on it information as to what you could do if you didn't like that I-O classification? [4]

A. Yes, the card had on it the right to appeal that.

Q. What was the first step of the right of appeal?

A. To appeal to your Board there, local Board for personal appearance.

Q. You did that in writing, as shown by page 36? I will show you the photocopy of the file and I have it opened to page 36. Is that the letter you refer to? A. Yes.

Q. Under what circumstances did you transmit that letter to your local Board?

A. I took the letter down to the local Board personally and presented it to the clerk.

Q. What was said, if anything, at that time?

A. Well, I presented it to her. She told me it was late.

I told her I realized that, that is why I brought it down, to see if she would accept it.

Q. Did you explain to her why it was late?

A. Yes, I explained to her the circumstances.

(Testimony of Richard Wayne Frank.)

The Court: Tell us what you told her. Then we will know whether it was an explanation or not.

The Witness: I told her I thought I had ten days from the date I received the letter to appeal it, and I received the letter rather late due to its going to the wrong address.

For a while there they were sending my mail, addressing [5] my mail to Clayton instead of Concord. My address was Clayton Road, Concord, and they were sending it to Clayton Road, Clayton; I don't know why.

Before they corrected that it happened that the letter was a few days late. When I found that out, rather than sending it in with no explanation, I went down personally and presented it to her and told her the circumstances, and asked if she would accept it.

Q. What did she say?

A. She said she would take the letter and present it to the Board there and it would be up to them to accept it. It wouldn't be up to her. And that she would let me know.

Q. Did you get any kind of an appearance before the local Board? A. No.

Q. Did you get any kind of an administrative appeal? A. No.

Q. Now, I believe you represented to the local Board in 1948 that you were an ordained and a regular minister. Will you tell us about your ministry?

(Testimony of Richard Wayne Frank.)

A. At that time I was devoting all my time to the ministerial work.

Q. When you say all your time, give it to us in hours and tell us what similar work you were doing.

Mr. Hicks: I object to this. We are bound by the record that he made with the local Board, and not by what he may testify to now.

Mr. Tietz: May I make a comment? This may save a little time.

Mr. Hicks is correct in the present state of the law, the Supreme Court has held just what he says.

I am laying the groundwork for a new point and if the court sustains the objection I would like to make a proof and I would then like to be able to argue it later.

The Court: Make your point now, and if I can I will rule on it now. If I need to take time, I will take time.

Mr. Tietz: My point is this: The Selective regulations specifically forbid a registrant to have a lawyer at this appearance before the local Board. That is the only opportunity he has to meet the Board members. At all times it is by the mails or talking with the clerk.

He had one or more appearances before the local Board at the end of his processing, and, as the file shows, those appearances were at the request of the Selective Service and not at his request.

Every time he attempted to introduce facts or arguments or to point out things in his file about

(Testimony of Richard Wayne Frank.)

his IV-D ministerial claim, which at an ordinary personal appearance hearing the regulations give him that right, but every time he attempted to do that he was informed the purpose of the hearing was not to consider his classification, but only what kind of work he [7] was to take under the work program. He was prohibited from having a lawyer at those hearings; the regulations says so.

Now, my point is this: It is a new point in Selective Service, and in defense of Selective Service cases, that it may be all right—I am going into an argument that will take two or three minutes, but it will save time later.

The Court: Go ahead.

* * * * *

Q. (By Mr. Tietz): Will you tell us about your ministry, with respect to the activities you engaged in during the period of your Selective Service processing, because that is what we are concerned with. Start at the beginning.

You may refresh your memory by looking at the exhibit, if that will help you. You filed a classification questionnaire in 1948, did you not?

A. Yes.

Q. On page 7 of the questionnaire, now known as page 12 of the exhibit, you were asked what classification you should be in and you said IV-D, the ministerial classification, isn't that right?

A. Yes.

Q. Then on page 3, which is now page 7 of the exhibit, you pointed out, or made the certification

(Testimony of Richard Wayne Frank.)

to the Selective Service System that you were duly ordained and you also were regularly serving as a minister, were you not? [8] A. Yes.

Q. That was in October 1948. What details concerning your ministry did you note in that eight-page document, such as what you did? I believe there is no mention of exactly what you did, is there? A. As to my ministerial activities?

Q. Yes.

A. Well, I engaged in going from door to door in my ministerial activities.

Q. What did you do when you went from door to door?

The Court: Does that show from this file? I have read those written statements by this defendant in the Selective Service file, which I gather, from them, was that he devoted his full time, except for occasional employment, doing the work commonly done by the Jehovah Witnesses, such as going from door to door and preaching where he could get anyone to listen.

And in addition to that, attending and presiding over meetings which occurred on Sundays and on certain other days. I think there is one showing of Thursday meetings.

Mr. Tietz: Yes. Then I will require only one or two questions to amplify it.

Q. (By Mr. Tietz): What are back calls?

A. That is calling back upon people who seem to be interested in the Bible, and trying to establish regular home [9] Bible studies with them.

(Testimony of Richard Wayne Frank.)

Q. You systematically make calls back to persons you had already contacted? A. Yes.

Q. How many times a week, in addition to Thursday, did you, during the period, regularly engage in studies with others or by yourself?

A. Practically every evening was taken up either with someone—studying with someone or preparing for my other activities, as presiding over meetings.

Q. Did you have a study called a Watch Tower?

A. Yes.

Q. What does that consist of?

A. That is our——

Q. I don't believe that is mentioned in there.

A. That is our magazine, Bible magazine we get two times monthly. We hold a systematic Bible study from that magazine, using it as a textbook every Sunday.

Q. Who is that? Who is "we"?

A. The whole congregation participates in that study, and at that time I was presiding over that.

Q. This congregation consists of a congregation of ministers or laymen? A. Ministers.

Q. All are ministers? [10] A. Yes.

Q. In addition to that, doesn't each one of these ministers have a territory that is his exclusively for some period? A. Yes.

Q. That is his congregation, also? A. Yes.

Q. So that each one of the Jehovah Witnesses really has two congregations, isn't that right?

A. That is true.

(Testimony of Richard Wayne Frank.)

Mr. Tietz: That wasn't mentioned in there.

I believe it is not necessary to elaborate further on that point.

You may cross examine.

* * * * *

Cross Examination

Q. (By Mr. Hicks): Mr. Frank, during the period of your classification, starting, say, in the fall of 1949 through 1951, or a period a little over two years, how many times did you visit the local Board? Just answer as best you can recall.

A. I couldn't tell you. Until 1951?

Q. Through 1951, how many times did you visit the local Board?

A. There were quite a few times there, I suppose. I [11] couldn't tell you just exactly how many.

Q. Do you recall what you did on the occasion that you visited the local Board?

A. You mean the purpose for why I went there? I think one time in particular I went there to present new evidence into my file.

I believe also in 1950 I went there for the purpose of telling them I was going to be away for a while, not exactly a change of address—I did give them a change of address there, too, in 1950, when I got married.

Also when I went to New York in 1950 I am sure I let them know then that I went. I am not too positive on that.

Q. Would you say you went there maybe a half

(Testimony of Richard Wayne Frank.)

a dozen times in that period of time of a little over two years? A. At least that.

Q. On each one of those occasions, did you look at the bulletin board when you went to the local Board?

A. Many times I had occasion to wait there and I looked at the bulletin board.

Q. Do you recall what you saw on the bulletin board? A. Yes.

Q. What did you see on the bulletin board?

A. On one side—very small room—they have a list of different people that had been getting out of the Army, different classifications they were being given. [12]

On the other side of the bulletin board they had little posters telling one different benefits one would have in the Army, and so forth like that; those I remember.

Is this a pretty good sized bulletin board, three or four feet across, something like that?

A. Probably so.

Q. And was there quite a bit of material on the bulletin board? A. No, not too much.

Q. Would you say there were 10 or 12 different things on the bulletin board?

A. Well, on this one bulletin board there might have been 10 or 12 different pages of the same material, but not different individual articles.

Q. Not different matters. Can you say here today, Mr. Frank, that you know that on each of

(Testimony of Richard Wayne Frank.)

those visits to that local Board there was not a list of advisers posted there?

A. Yes, I can say that.

Q. You know they weren't there?

A. If they were there I would have seen them.

Q. Mr. Frank, did you at any time speak to the clerk of the local Board during this period of time?

A. Yes.

Q. Through 1951, did you speak to the clerk of the local Board or anyone else at the local Board, saying you [13] would like to have some advice as to your rights and liabilities, and that sort of thing?

A. Well, I don't think I used those very words. In presenting that letter, was the only time there.

Q. Did you at that time ask, "Where can I get some advice about this"? A. No.

Q. At any time did you ask where you could get some advice?

A. Not through 1951 I didn't, no.

Q. Now, through that period—

A. Not through that period of time, but later I did.

Q. Later you asked the clerk at the local Board?

A. Yes, I asked the Board members where I could get some advice.

Q. What did they tell you?

A. Well, they referred me to—what I asked them was concerning this I-O job, different things about it. None of them seemed to know. They referred me to a certain individual, a lady—for information, that she was from the State Selective

(Testimony of Richard Wayne Frank.)

Service—just concerning the job. Later I think she was there at the Board meeting. I think she was there, something like that.

Q. You mean someone that you talked to just with respect to the civilian employment? [14]

A. Yes, someone from the State Selective Service.

Q. Now, Mr. Frank,—

The Court: While you are looking it up, we will take our afternoon recess.

(Short recess taken.)

The Court: Are you ready to proceed?

Mr. Hicks: Yes, I am.

The Court: All right.

Q. (By Mr. Hicks): Mr. Frank, you were ordered by your local Board to report for civilian work and you got that order early in June of 1954, is that right? A. Yes.

Q. You reported to the local Board on June 11th, is that right? A. Yes.

Q. The order you received told you to go to the Los Angeles County Department of Charities and report there on the 14th, the instructions they gave you at the local Board, is that right?

A. Yes.

Q. Did you report there on the 14th?

A. Yes.

Q. Where did you go when you went to the Department of Charities, the personnel office?

A. Yes, the personnel office there. [15]

Q. You had been there once before?

(Testimony of Richard Wayne Frank.)

A. Yes, I had.

Q. Did you talk to the same person you spoke to earlier? A. Yes, I did.

Q. When you had been there earlier, at that time you told them you wouldn't accept work that didn't give you more free time, is that the substance of it? A. Yes, that is right.

Q. The hours they had weren't satisfactory, is that correct? A. That is right.

Q. On June 14th did you only speak to one person?

A. Well, I probably spoke to the receptionist.

Q. I mean in regard to this matter.

A. Mrs. Pettijohn.

Q. You only spoke to Mrs. Pettijohn?

A. Yes.

Q. Did Mrs. Pettijohn tell you at that time they would not put you to work?

A. She told me she thought their commitment had been filled.

Q. Did she tell you at that time—that wasn't my question, Mr. Frank. Did she tell you at that time they wouldn't put you to work? [16]

A. Well, I don't know exactly how to answer that. I will say yes, she told me they wouldn't put me to work.

Q. She said, "You can't go to work," in effect?

A. Well, she said she would find out. She said she thought the commitments were full, but she would find out. That is what she said.

(Testimony of Richard Wayne Frank.)

Q. Did you have any other discussion with her at that time then?

A. Yes, she said, however, the jobs would be exactly the same as before. She said, "There is no change in the jobs."

Q. What did you say then?

A. I said, "Well, I wouldn't be able to accept it then."

Q. And you wouldn't take the work?

A. No.

Q. At any time did you ask them to employ you because of the order you had received from your local Board?

A. No, I didn't ask them—

Q. Did you hand her the order you received from your local Board?

A. Oh, yes, she kept that.

Q. At that time she said, "You can't go to work here," in effect?

A. In effect, I guess she did. [17]

Q. Mr. Frank, you once worked for the Golden State Dairy, didn't you?

A. Yes.

Q. In Concord.

A. Yes.

Q. You worked delivering milk?

A. Yes.

Q. Do you recall when you started that employment?

A. January 1, 1949, I believe.

Q. You continued to work there through August of 1952?

A. Yes, I suppose so.

Q. During that time were you working full time?

Mr. Tietz: I object. I think it should be made

(Testimony of Richard Wayne Frank.)

specific what he means by "full time". We all have general ideas about that.

The Court: The witness doesn't have to answer it yes or no. He should answer it yes or no, but he isn't limited to the yes or no. If he answers it yes, he may give an explanation. If he answers it no, he may give an explanation.

Mr. Hicks: I would be happy to withdraw the question and reframe it.

The Court: I would kind of like to hear the answer.

The Witness: Yes, it was an eight-hour job five days a week.

Q. (By Mr. Hicks): You worked a 40-hour week? [18]

A. 40-hour week, basically, yes.

Mr. Hicks: I have no further questions, your Honor.

The Court: Redirect only.

Mr. Tietz: Beg pardon?

The Court: Redirect only. No repetition of what we have had.

Mr. Tietz: I am getting ready for my final argument. That is why I am bringing my papers up.

The Court: You mean you are going to argue and the witness may step down?

Mr. Tietz: I have two or three questions first.

The Court: All right.

Redirect Examination

Q. (By Mr. Tietz): During this period that

(Testimony of Richard Wayne Frank.)

Mr. Hicks has asked you about, you worked for a dairy, how many hours a week did you average during all that period in your ministerial work?

A. Oh, an average of a hundred hours a month, probably.

Mr. Tietz: That is all.

The Court: Any further questions?

Mr. Hicks: No further questions.

(Witness excused.)

The Court: We will take the report from the Grand Jury and then hear argument on this case, unless you have other evidence, of course. [19]

Mr. Hicks: Your Honor, I am a little bit embarrassed. I feel compelled to call this Mrs. Pettijohn. This letter here from the defendant, I interpreted in a different light than the defendant's testimony would indicate.

In effect, his testimony has been he couldn't reject any employment because it was not there offered to him. He was refused it. In view of that, I feel compelled to call Mrs. Pettijohn. I don't have her here or under subpoena.

The Court: We are going to finish the trial today.

Mr. Hicks: I can't have Mrs. Pettijohn here today.

The Court: Can you have her here first thing in the morning?

Mr. Hicks: I know nothing about her. I assume I could contact her.

The Court: Where is she located?

Mr. Tietz: General Hospital, Los Angeles.

The Court: All right. You may consider this case recessed for a few minutes while I take the Grand Jury report, and start your subpoena process for 9:30 tomorrow.

Mr. Hicks: May I be excused from the courtroom?

Mr. Tietz: May I offer a suggestion? Possibly Mr. Hicks can get her on the telephone and get her in here this afternoon in half an hour, and then conclude all the testimony.

This man is from way up north. He came down just for [20] this trial.

The Court: This is an important case to him. He can stay here overnight.

Mr. Hicks: I will offer this as an alternative: I perhaps could reach Mrs. Pettijohn by telephone, if she is in an office. If I can, if what the defendant said is substantially what she says, I will have no more evidence to offer.

The Court: If you can get her here today I won't mind waiting a little after 5:00 to finish today. We have another case set at 10:00 in the morning, but if necessary, I will hear Mrs. Pettijohn at 9:30 in the morning.

(Short recess taken.)

The Court: The court understands from chambers conference with counsel that the witness who Mr. Hicks desires to call in rebuttal is going to testify as to only one or two points and will be available later in the afternoon today.

Counsel both expressed themselves as agreeable

to arguing the other points beginning now, and we will take that witness' testimony when she appears.

Is that correct?

Mr. Tietz: Yes, sir.

Mr. Hicks: That is correct.

The Court: All right.

* * * * *

The Court: You have a witness present? [21]

Mr. Hicks: May I call her now, your Honor?

The Court: Yes.

MARY A. PETTIJOHN

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated. Your full name, please?

The Witness: Mary A. Pettijohn.

Direct Examination

Q. (By Mr. Hicks): Mrs. Pettijohn, where are you employed?

A. At present Civil Service Commission, County.

Q. Where were you employed before you worked there?

A. Before that I worked for the Los Angeles County Department of Charities at the General Hospital.

Q. Were you employed there in June of 1954?

A. Yes, I was.

Q. Directing your attention, Mrs. Pettijohn, to

(Testimony of Mary A. Pettijohn.)

on or about June 14, 1954, were you employed at the Los Angeles County Hospital at that time?

A. Yes.

Q. In what capacity?

A. Chief clerk in the personnel office.

Q. Did you ever have occasion to meet Richard Wayne Frank?

A. Yes. [22]

Q. Do you recognize Mr. Frank when you see him? A. Yes.

Q. Do you see him in the courtroom?

A. Yes, I do.

Q. Where is he?

A. Sitting right over there (indicating).

Q. Sitting back here on this bench (indicating)?

A. Yes.

Q. Do you recall whether or not you saw Mr. Frank on or about June 14, 1954?

A. I checked with the hospital and the record I kept at that time said he was in the office.

Q. On the 14th?

A. I have the 16th here.

Q. Just on or about that time.

A. Around that time, yes.

Q. Did you speak to him yourself on that day?

A. Yes.

Q. Do you recall what your conversation with him was on that day?

A. Well,——

Q. Let me reframe that. Repeat your conversa-

(Testimony of Mary A. Pettijohn.)

tion as best you can recall, what he said and what you said on that day.

A. If I remember correctly, I talked to Mr. Frank on [23] two different occasions. One was early in the year and then he returned later on, and it was in June.

Mr. Tietz: If the court please, may I ask a few questions on voir dire?

The Court: For what purpose?

Mr. Tietz: To see if this recollection is from the witness' recollection or whether it is from a review of some papers she has in front of her, and if those papers were not made by her I would interpose an objection.

The Witness: These were made by me this afternoon from records I had made at the hospital at that time.

Mr. Tietz: You made these now?

The Witness: Right now.

Mr. Tietz: And you made records on June 14th or 16th, or some such date?

The Witness: Yes.

Mr. Tietz: And you copied from your own records?

The Witness: They were read to me over the phone after Mr. Hicks called me today, to refresh my mind, my memory.

Mr. Tietz: I think I should interpose an objection.

The Court: Let me ask a question. As you sit here now, with these notes that you have, do you

(Testimony of Mary A. Pettijohn.)

remember the transaction or are you just going to read the notes to us?

The Witness: No, I remember the transaction, but I didn't remember just the date and what information I had [24] written on the report I sent back to the State.

The Court: You tell us the conversation then, as you remember it.

The Witness: Well, could I go back to February when I first talked to him?

Q. (By Mr. Hicks): Will that make——

The Court: I will withdraw my question and overrule your objection, counsel.

Mr. Tietz: I am going to object now to an answer in February. We are not concerned with February. I didn't raise any objection. That is, the defendant testified only as to what occurred in June.

The Witness: Well, all right. I will tell what happened in June.

The Court: Well, let Mr. Hicks ask a question. I think, counsel, that this is a case of present recollection revived, rather than past recollection recorded.

We are going to allow the witness to testify as to her present recollection, which is apparently stimulated into new life by the refresher of the notes. She is not going to tell us what the notes say. She is going to tell us what is in her memory now, that has been brought back to activity by the notes.

The Witness: I talked in a period of a year and a half to, oh, I would say close to 200 boys, and it

(Testimony of Mary A. Pettijohn.)

is a little [25] difficult to remember what you say to each one, unless you can bring something back into your memory.

The Court: Let's let Mr. Hicks ask a question and then if you can answer it from your present recollection, answer it. Answer as best you can.

The Witness: Fine.

The Court: If you can't, if it is confused in your memory, just tell us.

The Witness: All right.

Q. (By Mr. Hicks): I will ask you, Mrs. Pettijohn, what your conversation was, as best you can recall it word for word, with the defendant on or about June 14th.

A. On or about June 14th, as I remember, Mr. Frank returned to our office and in the meantime we had had orders sent from his Draft Board, saying he should report to us on the 11th of June at 8:00 a.m.

When he came in I remembered that he had been there before and asked him if the situation were still the same, he would not be willing to work any hours assigned to him.

And he said that he wouldn't, and as far as I know, that is the result, all of our conversation.

Mr. Hicks: I have no more questions.

Cross Examination

Q. (By Mr. Tietz): If somebody hadn't read off something to you on the [26] telephone this aft-

(Testimony of Mary A. Pettijohn.)

ernoon, would you be able to testify as you have just testified?

A. Yes. I couldn't have given you the dates, but I could have testified to that.

Q. When Mr. Frank came to your office on about June 14, 1954, didn't you at that time tell him that your quota of I-O's was filled and you had no more vacancies for I-O work?

A. Not to my knowledge, no.

Q. Do you recall that that was a fact at that time?

A. It would not have been a fact, as long as we had received orders on him. We didn't turn away anyone that we had received orders on.

The Court: Had you received orders?

The Witness: Yes, we had orders he was to report to us on the 11th of June.

Q. (By Mr. Tietz): Those orders came from the Selective Service System, didn't they?

A. That is right.

Q. Do you know what your quota was at that time?

A. We didn't have any set quota. It depended on how many people were going in and out of service.

Q. How many I-O's did you have working at I-W work at that time?

A. I would say around 119. [27]

Q. Did you have any amount stated in figures, like 120 or 150 or 100 that you were to take of these I-O's?

A. No.

(Testimony of Mary A. Pettijohn.)

Q. Then the number you took depended on other employment factors? A. That is right.

Q. Would your records show whether or not at that time there were any vacancies for the kind of work given to these I-O's?

A. I think you perhaps could go back to the records and find that out.

Q. When you talked to your informant this afternoon on the telephone, did you ask if there were any openings for I-O's about that time, June 14th?

A. No.

Q. Was there any time during that period when you were not taking any I-O's?

A. Not if we had received orders on them.

Q. You mean that even though there might not be an opening for their type of work, you would take them and put them on the payroll?

A. We would have taken them within a period of three or four days. We would have made some arrangements on some position in the various categories we hired.

Q. This defendant has testified that you told him [28] that your quota was full and there were no jobs for I-O's at that time, and that you then discussed what he would or wouldn't do if an opening developed later. Would you say that is incorrect?

A. What I might have told him was that we had no jobs with regular hours that he wanted. I could have told him that. There are certain positions, such as clerical positions, that we filled if

(Testimony of Mary A. Pettijohn.)

we had vacancies, where they would have regular day hours and would be able to be off on Sunday, which, I believe, was the day Mr. Frank said he had to be off.

Q. He testified flatly to that, that you had told him there were no I-O jobs open at that time. Do you say that is an incorrect statement of your conversation?

A. I say that is an incorrect statement, yes.

Mr. Tietz: That is all.

Mr. Hicks: No further questions, your Honor.

The Court: Thank you, Mrs. Pettijohn. You are excused.

(Witness excused.) * * * * *

(Whereupon, at 5:20 o'clock p.m., Wednesday, March 2, 1955, an adjournment was taken to Thursday, March 3, 1955, at 9:30 o'clock a.m.)

[Endorsed]: Filed June 6, 1955.

[Endorsed]: No. 14787. United States Court of Appeals for the Ninth Circuit. Richard Wayne Frank, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: June 10, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14787

RICHARD WAYNE FRANK, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S STATEMENT OF POINTS

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above entitled cause.

I.

Defendant was denied procedural due process in that the local board failed to have available an Advisor to Registrants and to have posted conspicuously, or any place, the names and addresses of such advisor, as required by the Regulations, and to defendant's prejudice.

II.

The local board abused its discretion by arbitrarily refusing to grant defendant an Appearance Before Local Board, in December, 1951 when he personally presented a written request for the appearance.

III.

The defendant was denied due process when the local board arbitrarily refused to reopen his classification on and after December 17, 1951 when he

presented new evidence not previously considered, which if true, required a reclassification.

IV.

The defendant was denied procedural due process in that the local board failed to forward his file to the Appeal Board in December, 1951 when his request for the Appearance Before Local Board was denied and his excuse for late filing was not accepted.

V.

The defendant was denied due process when the Appeal Agent did not take an administrative appeal for defendant in December, 1951.

VI.

The defendant was denied procedural due process in that the Selective Service System did not comply with its regulation §1660.20.

VII.

The Government has wholly failed to prove a violation of the Act and Regulations by the defendant as charged in the indictment.

VIII.

The order of the local board for defendant to perform civilian work at Los Angeles Department of Charities, Los Angeles, and sections 1660.1 and 1660.20 of the Selective Service Regulations are in conflict with the Act, because the work is not national or federal work as required by the Universal Military Training and Service Act.

IX.

The Act, as construed and applied by the Regulations and the order, calls for a private nonfederal labor draft for the performance of services that are not exceptional or related to the national defense, in violation of the Thirteenth Amendment to the United States Constitution.

X.

The Act, as construed and applied by the regulation and order, is unconstitutional because it deprives the defendant of due process of law contrary to the Fifth Amendment to the Constitution.

XI.

Section 462 (a) of the Act, Part 1660 of the regulation insofar as they have been construed and applied to the defendant are an unreasonable abridgment of his right of property contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

XII.

Sections 1660.20 (d) and 1660.30 of Part 1660 of the Regulations are contrary to the First, Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

/s/ J. B. TIETZ

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 16, 1955. Paul P. O'Brien, Clerk.

No. 14787

In the
United States Court of Appeals
For the Ninth Circuit

RICHARD WAYNE FRANK,	}
<i>Appellant,</i>	
vs.	
UNITED STATES OF AMERICA,	
<i>Appellee.</i>	

Appellant's Opening Brief

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FILED

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PAUL P. O'BRIEN, CLERK

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<i>Appellant,</i>		
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No. 14787

Appellant's Opening Brief

JURISDICTION

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to custody of the Attorney General for a period of four years on Count One, with a probationary proviso, and imposition of sentence on Count Two was suspended. [R 10-12]* Title 18, Section 3231, United States Code confers jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [R 13]

*R refers to the printed Transcript of Record.

STATEMENT OF THE CASE

The indictment charged appellant with two violations of the Universal Military Training and Service Act. [R 3-5] It was alleged that he became a registrant of Local Board No. 31 of the Selective Service System in the County of Contra Costa, State of California and that having theretofore been duly classified in Class I-0, did [in Count One] knowingly refuse and fail to comply with the order of his said Local Board No. 31 to accept employment doing civilian work contributing to the maintenance of the national health, safety and interest at the Los Angeles County Department of Charities, on February 23, 1954 and [in Count Two] did knowingly refuse and fail to comply with the order of his Local Board No. 31 to accept the same employment on June 18, 1954. [R 4]

Appellant pleaded not guilty, waived jury trial and was tried on March 2, 1954. [R 16-] A written motion for judgment of acquittal was filed. [R 7-] The motion was denied and the appellant was found guilty on March 3 and sentenced on March 3. [R 10-12] The motion contains all of the grounds that the appellant relies upon for reversal of the judgment in this case. [R 42-]

THE FACTS

Appellant registered with Local Board No. 31 on September 16, 1948 [Ex 1-2]* He answered the question "7. Occupation" by the word "Minister," and the question "8. Firm or individual by whom employed" by the expression "Jehovah Witnesses." He filed his eight-page Classification Questionnaire on October 21, 1948. [Ex 4-] In it he showed he was a minister of religion [Ex 6, Series V, 1(a)]; that he regularly served as a minister; that he had been a minister since July 28, 1940, having been ordained on that date. He stated he did secular work only when he needed funds and did not have any regular secular work. [Ex 8] He signed Series XIV (conscientious objector declaration) [Ex 11]. He explicitly claimed the IV-D (minister's) classification [Ex 11]. He filed the completed Special Form for Conscientious Objectors [Ex 29-] and tried to make clear in it that his conscientious objections to war were based on and were the product of this dedication to his ministry.

At the same time he presented considerable documentary material to establish his claim to the IV-D minister's classification:

- Ex 16, that he was an official of the Pittsburg, California Company of Jehovah's witnesses;
- Ex 17-18, his biography as a minister;
- Ex 19-20, his appointment as a Pioneer. [full-time minister] dated November 1, 1947;

*Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

Ex 21, his superior's endorsement of his work;
 Ex 22, corroborating affidavits from friends.

Nevertheless, the local board classified him as a conscientious objector, Class IV-E, on September 20, 1949. [Ex 12] At that time the classification entailed no obligation that interfered with his ministry, so he interposed no objection to it. He was then as free to follow his ministry as if he had been given the IV-D (minister's) classification. In the fall of 1951 the regulations were changed: The classification name of IV-E was changed to I-0 and also, I-0 entailed an obligation of twenty-four consecutive months of work as ordered by the local board.

The local board, conforming to the new law, placed appellant in Class I-0 on November 19, 1951 and mailed him a notification on November 20, 1951. [Ex 12] On December 7, 1951 appellant appeared in person at the office of the local board bearing an explanatory and argumentative letter, dated December 6, 1951 and then and there filed by him. [Ex 36] He also explained to the clerk of the local board why he was late in responding to the November 20th notice and why he wanted a personal appearance before the board and an appeal: He stated to her that his mail from the local board was being missent, to wit, his address was Clayton Road, Concord and the board was addressing his mail to Clayton Road, Clayton. [R 10-20] It is to be noted that the local board for some time thereafter, nevertheless, sent his mail indiscriminately to one or the other address. See Ex 42 and succeeding pages. In

fact, on March 23, 1953 it sent him mail addressed to both addresses: See Ex 65, 76. At this time (March 23, 1953) he again informed the board of his correct address [Ex 79] and thereafter his mail was correctly addressed.

When appellant visited the local board office on December 7 he also presented some more documentary evidence of his ministry. [Ex 37-38] He subsequently presented still more such evidence [Ex 40, 41] but his classification was never reopened or even reviewed.

The local board did not thereafter give him a personal hearing nor did it send his file to the appeal board. [Ex 12, R 19-20] He has never had an appellate determination [Ex 12] nor has he ever had a personal appearance before the local board, within the definition of the law. [He was called in on April 6, 1953, for the limited purpose of an "arbitration" concerning a type of civilian work. Ex 81-83]

Appellant testified the local board did not post the names and addresses of Advisors to Registrants. [R 17, 27] No selective service officials, or anyone else, testified on this subject.

During the entire processing period the board had no evidence that refuted, in any manner, or to any degree, his claim for a IV-D classification. He had initially shown he was a full-time minister (Pioneer) in his religious society [R 21, 23; Ex 1, 7, 8] doing secular work, for relatives, only when he needed some cash; on December 17, 1951 he indicated on a Selective Service System form that his secular employment, since

December 1, 1949 had been as a milkman for "Golden State Dairy Products;" [Ex 39]; even long after his last classification, on July 8, 1952 the file shows that the local board itself considered that he was "unemployed except when necessary or convenient; then only for relatives, holds no full or part-time job." [Ex 44]

Despite of his new evidence, he was neither given the IV-D classification, nor was his classification reopened, nor even was his new evidence considered and rejected (in writing, as required, or at all), but he was sent an "Application of Volunteer for Civilian Work" [Ex 63] on October 23, 1952. To a follow-up request from the local board he replied that his obligations to his family (he had become married) and to his local congregation were such that he could not abandon them lightly. [Ex 73] Subsequent "arbitration" and correspondence with the local board shows that his problem was two-fold: Supporting his family [Ex 109] and keeping his consecration to his ministry, that is, the job must allow time for his ministry work at its effective hours. [Ex 116] When he was ordered to report at the Los Angeles Department of Charities on February 24, 1954 [Ex 130] he did so but refused to accept the work offered when he learned that the hours would prohibit his effective preaching work. [Ex 134] The General Counsel of the Selective Service System (Col. Daniel O. Omer) refused to recommend prosecution because he considered it was error for the board to have ordered appellant to report directly to Los Angeles. [Ex 103] Consequently a new order was given appellant, to report to his local board office for in-

structions for work, on June 11, 1954. [Ex 150] A duplicate of this order was sent the prospective employer who returned it with the notation that appellant had refused the work offered because of the work hours involved. [Ex 152] The appellant's version is similar. [Ex 161]

Prosecution followed. [R 3-5]

QUESTIONS PRESENTED AND HOW RAISED

I.

In December, 1951 appellant requested a personal appearance before the local board so he could protest the denial to him of a IV-D, minister's classification. The clear import of the written request [Ex 36] was that the registrant was appealing for a review. He testified that he understood asking for the appearance was the first step in the appellate process. [R 19]

When appellant presented the written request, several days "late" he explained to the clerk [R 19-20] why his written request was late. His testimony on this subject was not contradicted or rebutted in any manner, nor during his cross-examination was his explanation in any manner questioned.

The question presented here is whether his excuse for the tardy written request is legally sufficient so that the facts that he never had a personal appearance hearing or an appeal become denials of due process.

The question was raised by motion for judgment of acquittal. [R 7-10] All the following questions were raised in the same manner.

II.

During the period (and at all times before) when appellant attempted to secure a review of the denial of his IV-D claim, it is undisputed that his local board never posted the names and addresses of Advisors to Registrants.

Appellant therefore had no means of learning that he could also request the State Director of Selective Service and the Director of Selective Service to perfect an appeal for him.

The question presented here is whether the failure to post the names and addresses of Advisors to Registrants is in itself a denial of due process. Also involved here is whether it need be shown that the registrant has been prejudiced by such a failure to post, and further, if this is so was this appellant prejudiced?

III.

Appellant was last classified on November 19, 1951. On December 7, 1951 he presented some new evidence of his ministry; he presented more previously unconsidered evidence, up to at least February 15, 1952.

The local board did not reopen his classification upon receipt of this evidence; the local board never sent him the notice, required by §1624.4 of the regu-

lations informing him a decision not to reopen had been made.

The question presented here is whether the failure to reopen his classification was a denial of due process. Also involved here is whether the failure to conform to the regulation requiring that his evidence be considered and that a decision to refuse to reopen is to be followed by a notice to registrant, are also denials of due process.

IV.

Appellant was indicted and convicted and sentenced on each of two counts.

Each count was for a refusal to accept work as ordered, at the Los Angeles Department of Charities, the date of each order being different. Appellant argues that the evidence shows conclusively that the second order was intended solely as a substitute for the first.

The question presented here is whether the issuance of the second order was a waiver of the refusal to obey the first.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

I.

Appellant was improperly denied an administration hearing and/or an administrative appeal.

The file shows that appellant, from the very first, claimed that he was a minister and within the selective service definition.

The trial court's statement that he would consider appellant a minister, on the evidence in the Selective Service file [Supp. Trans. of R. p. 2] *is a finding* that there was no basis in fact for the local board to have denied its registrant the IV-D classification. *Dickinson vs. United States*, 74 S. Ct. 152.

He had presented a *prima facie* case that ministry was his vocation. He was not given the IV-D classification although his undisputed evidence up to and even long after his last reclassification was that he did secular work only spasmodically and then but for a few hours a week.

Nevertheless, and despite of the trial court's finding and the *prima facie* condition of his file it is not appellant's argument that this case presents a no-basis-in-fact situation under the *Dickinson* rule. It is appellant's sole argument here that he should have had an administrative appellate determination.

In December 1951 when he presented a written appeal for review a few days after the ten-day period expired, his reason for the tardiness was ignored. His reason was that the local board had missent his Notice of Classification. This reason is a reasonable one and has been recognized as such by the courts. *In re Abramson*, 196 F. 2d 261.

II.

Appellant was deprived of the Advisor to Registrants and was prejudiced.

Appellant testified his local board did not post the names and addresses of Advisors to Registrants on the office bulletin board. [R 17] Appellee placed no witnesses on the stand to rebut this testimony; it is therefore hardly disputable but that this is a fact. *United States vs. Di Re*, 332 U. S. 581 (1948). Moreover, in every case that has come to this Court involving this point, it is clear that the California boards did not post such information. See the trial judge's comment on *Uffelman*, No. 14780 [Uffelman, R 23, 45]; also see *Chernekov vs. United States*, 219 F. 2d 721, 722, 724.

The law requires the posting [§1604.41 of 32 C.F.R.] and this Court has declared that failure to post pre-

sents a problem of due process, *Cherneckoff*, supra, page 724. Also, it is so serious a departure that an administrative appeal doesn't cure the defect. *Ibid* and *Franks vs. United States*, 9 Cir., 1954, 216 F. 2d 266.

Moreover, this appellant was grievously wronged by the failure to post because he knew of no place to turn for aid when his tardy December 6, 1951 request for a review was ignored. The Advisor's duty would have been to inform him that both the Director and the State Director had authority to help him and that they did frequently intervene in behalf of registrants whose local boards either misunderstood the law or who abused their discretion.

III.

Appellant was denied due process when the local board refused to either reopen his classification or to consider reopening it.

On November 19, 1951 appellant was classified for the last time. On December 7, 1951 and up to at least February 15, 1952, he submitted new and further evidence of his ministry, evidence not previously considered, and, if true, [that the ministry was his vocation] of a nature that required his reclassification. Not only did the board fail to reopen his classification, but it failed to consider it and to send him such notice, as required by §1625.4 of the regulations. Such two failures are independently denials of a due process and the courts have so held.

- United States vs. Clark*, W.D.Pa., 1952, 105 F. Supp. 613;
United States vs. Crawford, N.D.Calif., 1954, 119 F. Supp. 729;
United States vs. Nimori, No. 33680, N.D.Calif. S.D. (Sept. 25, 1953);
United States vs. Nichols, No. 22951-HW, S.D. Cal. C.D. (Dec. 14, 1953);
Berman vs. Craig, 3rd Cir., 207 F. 2d 888;
Hull vs. Stalter, 1945, 151 F. 2d 633;
United States vs. Lacasse, No. 23222-PH, S.D. Calif. C.D. (Jan. 13, 1954).

IV.

The Government did not sustain its burden of proof in connection with Count One of the indictment.

The delinquency of appellant (if any) in connection with the first order to report was waived by the issuance of the second order. The evidence shows that the second order was solely intended, and actually was, only a substitute for the second.

ARGUMENT

I.

APPELLANT WAS UNFAIRLY DENIED AN APPEARANCE BEFORE LOCAL BOARD AND/OR AN ADMINISTRATIVE REVIEW.

Appellant's file shows that he had presented a considerable amount of evidence that he was a minister and that the ministry was his vocation. He did this from the very first. He did this at every opportunity. If this Court agrees that he had presented a *prima facie* case for a minister's classification then it requires no argument that no basis in fact existed for the conscientious objector classification, for the latter is a "higher" classification than the former and the regulations require the board to place the registrant in the "lowest" classification that his evidence justifies. [32 C.F.R. §1623.2]

Significant, and perhaps ordinarily dispositive of the problem is the trial court's statement that he would consider appellant a minister, on the evidence in the Selective Service file [Supp. Trans. of R. p. 2]. This is really a *finding* that there was no basis in fact for the local board to have denied its registrant the IV-D classification. The verdict of guilty is, therefore, contrary to the trial Court's finding.

Dickinson vs. United States, 74 S. Ct. 152.

However, it is not appellant's argument that he presents a no-basis-in-fact case under the *Dickinson* rule.

Appellant does not ask the Court to hold he is within *Dickinson*. Appellant argues *only* that he should have been given an administrative appeal to determine his status.

When the local board gave him only the conscientious objector's classification he was entitled to an administrative appeal if he conformed in every substantial respect to the prescribed method of perfecting an appeal. The problem presented in this case is the tardiness of his request. The Notice was mailed to appellant on November 20th; he responded on December 7th.

As appellant testified, the postcard Notice of Classification also has printed on it information concerning his right to appeal and that the first step was to ask the local board for a rehearing, termed a personal appearance before local board. [R 19]

Appellant, on December 7, 1951, personally presented a written request for the review and made an explanation to the clerk for his tardiness, namely, that his mail was missent. [R 20] His request was ignored by the board and the record shows he never has had a personal appearance nor an administrative appeal. The "interview" that he did have with the board in 1953 was not at his request and was for the sole purpose of persuading him to abide by the work rules of the Selective Service System. This interview afforded him no opportunity to present reclassification evidence or to take an appeal. In passing, it is to be noted that his change of status from that of "pioneer" [substan-

tially full-time minister] in 1951-1952, to that of the "publisher" [one who devotes to his ministry all the time he can spare from secular work] in 1953, in no way weakens his defenses in this case because his last classification was made during the period when he was a pioneer. If the board, at this 1953 interview, had "reopened" his classification and *then reclassified* him again in Class I-0, his rights to a genuine personal appearance and to an administrative appeal would obviously have been unproductive to him because of his 1953 status change. The board would have been guiltless; here it is not.

Here we are confronted with a denial of right that occurred at a time, December 1951, when his status was undisputable. He was then a pioneer, a "full-time" minister as well as being a minister by vocation. The climate of December, 1951 and the lack of high court clarification until November 1953 [*Dickinson vs. United States*, 74 S. Ct. 152] explains, but does not justify the refusal of the local board to give him a IV-D classification. Today, the pioneer Jehovah's witness less frequently encounters such a failure on the part of a board to face facts as is presented by his file.

This Court's approach to a determination of whether there was denial of due process must be made according to the status when appellant requested a re-opening of his classification.

Hull vs. Stalter, 7th Cir., 1945, 151 F. 2d 633.

However, the principle problems to be considered on the question of the claimed denial of due process

[no hearing or appeal] lie in a different area. Appellant's tardy letter presents certain questions:

1. Did the board have authority to waive the ten-day rule? The answer is found in subsection (d) of Section 1626.2:

“(d) At any time prior to the date the local board mails to the registrant an Order to Report for Induction (SSS Form No. 252), the local board may permit any person described in paragraph (c) of this section to appeal even though the period for taking an appeal has elapsed, if it is satisfied that the failure of such person to appeal within such period was due to a lack of understanding of the right to appeal or to some cause beyond the control of such person. Unless the local board there after permits an appeal, the right of such persons to appeal shall expire at the end of the period provided for in paragraph (c) of this section. If an extension of time to appeal is granted by the local board, a record thereof shall be entered on the Classification Questionnaire (SSS Form No. 100) under the heading ‘Minutes of Actions by Local Board and Appeal Board.’ ”

2. Was the board arbitrary in refusing relief to appellant?

Regardless of how strict a board may be in scrutinizing its registrant's evidence for a deferred or exempt classification, there is no justification for strictly construing his appellate rights. This is particularly so when the claim is made that the delay was caused by some fault of the Selective Service System. Here, the registrant complained

his mail was coming late. [R 19-20; also see Ex 42 and succeeding pages, particularly 65 and 76 for the continuing confusion of address] Under like circumstances it has been held that the registrant's tardiness was excusable. The Third Circuit decided that where substantial error appears in the mailing address, the communications should not be considered as mailed to the addressee at least until the time of delivery. *In re Abramson*, 196 F. 2d 261, 264. Appellant submits that the situations are comparable. Appellant repaired to the local board office, bearing his written request, within ten days of the delivery of the notice. [R 19-20]

A situation was presented two years ago in a district court where the registrant tardily received a notice of the date set for a hearing and he then asked for resetting. Chief Judge Leon Yankwich expressed himself both on this subject of notice tardiness and on the importance of granting a registrant his procedural opportunities. as follows:

“THE COURT: All right, gentlemen, call Jack Howard Waterfield. Do you gentlemen desire to add anything to the argument you made about two weeks ago in this matter?

THE COURT: Gentlemen, I think this man was not given due process. I do not believe, when a man makes a request, that a Board can send a letter and then, when notified by the defendant's mother that he is away temporarily, just say ‘We won't give you another date.’

Obviously, the law does not require the man to hold himself at military attention and salute the moment he asks for a personal interview. He has a right to be treated as reasonable human beings are. This man asked for a personal interview. The letter from the Board reached his home while he was out of town. It is not required for a man, when he has been classified by a Board, to remain in town at the Board's beck and call. The Board should be reasonable about it.

In this particular case, supposing the man's mother had not lived there, and the letter had reached his home while he was gone? You couldn't put him in default when the man hasn't received the letter. As a matter of fact, in law we allow three days extra on service by mail, on the presumption it might be delayed; but this man's mother opened the letter, and she called up, and the Secretary of the Board wrote down 'The mother says he is out of town.' Then when he came back, he went down immediately, and they said, 'It is too bad, you are too late.' In the meantime, they had written, 'Request for another hearing, oral, denied. The registrant did not appear.'

They knew why he didn't appear. That is not a frank statement. In typewriting, on page 35 of the record, appears:

•Jack Howard Waterfield, 4-79-31-58
November 3, 1952

Jack Howard Waterfield's mother called and said that he is out of town and would not be in today. Would like another appointment for next Monday.

I told her I would put it up before the local board.'

In spite of that, she writes below:

'Registrant did not appear 11/3/52.'

He wasn't there; he hadn't received the notice. He had been out of town.

'Request for another appearance denied.'

So they denied it arbitrarily, depriving him of the right of appeal, and that is not due process.

I find the defendant not guilty, as the only method of correcting an injustice. This man was entitled to a personal appearance, and he did not get it, and they had no right to say he had to stay around. That is not due process, as I understand, so the man is found not guilty.

MR. TIETZ: Bond exonerated, your Honor?

THE COURT: Bond exonerated."

United States vs. Waterfield, S.D.Calif. No. 3143-N.D. May 15, 1953.

Another somewhat similar situation arose even more recently before the late Judge Campbell E. Beaumont. The defendant complained that he received his mail too late. He was an oil field roustabout and mail was often delay in the forwarding:

"MR. KWAN: In this case, your Honor, he has been given the full requirements of the Selective Service System in so far as appearance before the draft board.

MR. TIETZ: We dispute that. He asked for a personal appearance, and he didn't get his mail,

and he begged for another chance. 'Give me another date', he said.

THE COURT: I am interested in that phase, Mr. Tietz. What was the testimony in regard to his asking for another chance here?

MR. TIETZ: It is written, your Honor; it is in the file. I will be able to turn to it in a moment, I think. Page 32. Page 36 is their denial.

THE COURT: Page 32, is it? Well, read it.

MR. TIETZ: 'Local Board No. 70, Fresno County, 472 Palm Avenue, Fresno, California. Gentlemen:

'I was granted a personal appearance before your board on February 12. However, I did not receive the notice of the appearance until February 16, so could not be there. I will be glad to come if you will grant me another hearing.

'Please change my address to 305 E. Bunny Avenue, Santa Maria so that I will receive my mail on time.

'Leeman Williams.'

Then following are some envelopes to bear it out. And then on page 36 we have a copy, carbon copy apparently, of a letter sent to Leeman Williams, General Delivery, Santa Maria, California:

'Dear Sir: Referring to your undated letter regarding your request for personal appearance, this is to advise that you were granted an appearance before this Board within the 10 days allowed and you failed to appear. This 10-day period may not be extended. (SSS Reg. 1624-1(a). Your file has been forwarded to the Appeal Board for action.'

“The COURT: Well, let the young man come forward, and be sworn. He has been sworn already. Take the stand.

LEEMAN ROY WILLIAMS,

Having been previously duly sworn, was examined and testified as follows:

THE COURT: You may question him.

DIRECT EXAMINATION

BY MR. TIETZ:

Q. I am going to ask you to look at Government's Exhibit page 1, page 31, and briefly identify it.

A. Is that the—

Q. What is it?

A. This is when I was granted my personal appearance before the local board.

Q. When did you get the letter?

A. Well, I don't remember the date.

Q. Turn over to the next page or two and see the postmarked envelopes, and see if that refreshes your memory.

A. Oh, yes, I remember now. This is when I got it, February 16th. In other words, I went in daily to the post office because I was expecting a personal appearance, and I didn't receive the notice until the 16th.

Q. And were there other occasions when mail from your local board to you at this address had been delay more than a day or two?

A. Yes, but I don't remember, I don't recall just exactly where it is in the file.

Q. Do you recall the kind of mail it was?

A. No, I don't.

MR. TIETZ: That is it, your Honor, as I recalled the testimony that he tried to get it each day, knowing that such a letter would come, and it did not come until the 16th.

THE COURT: Have you any questions?

CROSS EXAMINATION

BY MR. KWAN:

Q. Did you make daily trips to the post office?

A. Yes.

Q. Is that from your memory? Is that as best you can remember or to your knowledge?

A. That is according to my memory and the best of my knowledge.

Q. Could you have missed going to the post office—

A. No.

Q. —during that period and asking general delivery for your mail?

A. No.

THE COURT: Are you sure you went to the post office every day before the 16th?

THE WITNESS: Before the 16th? From the 8th to the 16th, yes.

THE COURT: Mr. Tietz, is there any specific time that must be given in regard to this matter? Now, on your request for personal appearance 'an appointment has been made for you to appear on February 12th.' That was dated February 8th. That is only four days.

MR. TIETZ: No. There is no time. I even know of instances of them calling up and saying 'come on down right away, there is a board member here and he can hear you.' And I have never found any reason or occasion to object. Also on the other hand, hearings sometimes go over for months.

THE COURT: Well, I think the Court must accept this young man's testimony in regard to the matter, and I think he should have been given the personal appearance, the extension of the personal appearance.

What were you going to say?

MR. KWAN: Your Honor, I might submit to the Court the fact that once he has been classified by the local board and after he has been classified by the appeal board, the classification by the appeal board supersedes the entire proceedings, and if there were any error in the local board's classification it has been cured by the action of the appeal board.

MR. TIETZ: A novel interpretation.

THE COURT: The court will find the defendant not guilty. The bond is ordered exonerated.

MR. TIETZ: Thank you."

United States vs. Williams, S.D.Calif. No. 3230
N.D., Sept. 20, 1954.

The testimony of appellant Frank contains the clear inference that he came to the local board office with his letter to it dated December 6, 1951, within ten days from his receipt of the Notice of Classification

dated November 20, 1951. [R 20] His testimony was in no manner rebutted nor was he even cross-examined on this subject. The failure to call the local board clerk to contradict his testimony gives rise to the presumption that his evidence is undisputable.

United States vs. Di Re, 332 U. S. 581 (1948).

Furthermore, this Court early recognized that registrants are not to be treated as are lawyers engaged in formal litigation. *Cox vs. Wedemeyer*, 192 F. 2d 920, 923.* Lawyers must carefully observe jurisdictional deadlines in filing appeals. It is not consistent with either the spirit or the letter of the Selective Service law to require such exactitude of registrants. The law permitted the board to accept its registrant's excuse and give him an appeal. It was unfair and arbitrary to cut him off from an appellate determination. His claim was not frivolous. His consecration to his ministry was most serious to him. That he subsequently altered the ratio of secular and ministerial time is neither material to the issues here nor in any way a reflection on his sincerity. It follows the normal pattern of Jehovah's witnesses, namely, a fluctuation resulting from altered financial circumstances. These missionary ministers engage in "pioneering" whenever possible. To some it is never possible. For others (like appellant) it is intermittent and the intermittent pattern is always consistent with family need. The pattern has no relationship whatsoever to draft laws. That

**Talcott vs. Read*, 9th Cir., 217 F. 2d 310; *Hufford vs. United States*, 103 F. Supp. 859, 862; *Berman vs. Craig*, 107 F. Supp. 529, 531 (Aff. by 3 Cir., 207 F. 2d 888); *Ex parte Fabiani*, 105 F. Supp. 193, 149.

it may present an in again, out again, gone again Finnegan bookkeeping problem to draft boards is beside the point. The law recognizes that draft status is subject to change. "1625.1 Classification not Permanent.—(a) No classification is permanent." [32 C.F.R. §1625.1]

If a local board is determined not to recognize the ministry of its registrant, it at least should permit him an appellate determination of his claim and evidence. Since this was denied appellant, the judgment of conviction is based on an order to report that is void because of this denial of due process.

II.

APPELLANT WAS DEPRIVED OF THE ADVISOR TO REGISTRANTS AND WAS PREJUDICED

It is indisputable that appellant's local board did not post the names and addresses of Advisors to Registrants. Appellant testified he was frequently in the local board office during his selective service processing, looked at the Bulletin Board and never saw such a posting. [R 17] On cross-examination he was definite that if such a posting had been present he would have seen it. [R 27] No board members or other officials were placed on the stand to in any manner contradict this. Under *United States vs. Di Re*, 332 U. S. 581 (1948) it is therefore a fact.

Moreover, this Court's records indicate, from every one of the cases before it involving this point, that the California boards have never had Advisors to Regis-

trants for many years. See *Uffelman vs. United States*, No. 14780:

“Cross Examination

“MR. FOSTER: Q. You remember everything that was on that board from the first time you registered?

THE COURT: Now, Mr. Foster, I don't think there is any necessity of going into it. You know there is none posted and there is no use in cross examining the witness on that subject. Both the clerk and Col. Ferrill have testified that there weren't any such, and it is immaterial to me whether he saw it or didn't see it because there wasn't anything there.”

[*Uffelman Record*, page 45]

Also, see *Chernekov vs. United States*, 219 F. 2d 721, 722, 724.

Under the law, during all the period of appellant's selective service processing, it was essential to due process that the local board post the names and addresses of Advisors to Registrants.

At all times concerned, 32 C.F.R. §1604.41 read as follows:

“ADVISORS TO REGISTRANTS

1604.41 APPOINTMENT AND DUTIES.—

“Advisors to registrants shall be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms

and to advise registrants on other matters relating to their liabilities under the Selective Service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

On January 31, 1955 E.O. No. 10594 changed §1604.41 of the Selective Service Regulations by making the appointment of Advisor permissive instead of mandatory. The change of one word in the regulation "shall" to "may" indicates a prescient anticipation of this Court's February 24, 1955 *Chernehoff* opinion; the briefs were in, oral argument had been heard and the handwriting was on the wall.

A trial court (the later of the two decisions that have been reported) has reached the same conclusion as did this Court in *Chernehoff*:

"At no time does it appear that he was apprised of his right to consult with a Selective Service advisor as provided for in the regulations, nor did he see any notice posted in the premises occupied by the board informing him of such right, nor was any such notice called to his attention. None of this testimony was controverted by the Government."

United States vs. Giessel, 129 F. Supp. 223.

But see the earlier one: *Dorn vs. United States*, 121 F. Supp. 171.

This type of failure on the part of a local board is of such a serious nature that it alone is a denial of due process and no administrative appellate procedure can cure the defect. This Court has so indicated in *Cherneckoff*, supra, page 724, citing *Franks vs. United States*, 9 Cir., 1954, 216 F. 2d 266.

Deprivation of such an important procedural opportunity should be considered a jurisdictional matter much as deprivation of notice of classification with its concurrent notices of rights to a personal hearing and to an appeal. It is more than a mere clerical error. Since the scope of review is selective service prosecutions is so limited, procedural due process should be strictly adhered to. In fact, the rule is stated in *N.L.R.B. vs. Cherry Cotton Mills*, 5th Cir., 98 F. 2d 444, 446, as well as in many other cases, that where the scope of review is very narrow and restricted then the need for an insistence on strict compliance with the procedural regulations must be followed. It is so even in draft cases. (See *Ver Mehren vs. Sirmeyer*, 8th Cir., 36 F. 2d 876, 881, and *United States vs. Zieber*, 3rd Cir., 161 F. 2d 90, 92.)

It must be recalled that under the selective service law it is unnecessary to allow the defendant to have counsel before the board. He has no right of counsel and cannot insist on a lawyer being present. See *United States vs. Pitt*, 3rd Cir., 1944, 144 F. 2d 169; *Niznik vs. United States*, 6th Cir., 1949, 173 F. 2d 328. Since the registrant does not have a lawyer when he appears before the local board for his hearing, this of

necessity means that he must have some sort of advice. The only way that he can get advice is for him to get it from the Advisor. While posting is constructive notice, the failure to give it is no less a violation of procedural due process than is the failure to give actual notice when actual notice is required by the regulations. When actual notice is required, failure to give it is fatal.—See *United States vs. Fry*, 2d Cir., 1953, 203 F. 2d 638; *United States vs. Stiles*, 3rd Cir., 1948, 169 F. 2d 455.

Nevertheless, if a showing of prejudice is required, this appellant's record shows that he was grievously wronged by the board's dereliction. It is undisputable that he never received either a hearing before the local board or an appellate determination, although he made a written request. [Ex 36] This request, as argued hereinabove, should have resulted in the desired opportunity. Assuming here, *arguendo* that the local board was justified in ignoring his plea because it was tardy, we are confronted with another situation: the Selective Service Regulations authorize both the Director and the State Director to perfect an appeal for such a registrant:

“1626.1 Appeal by Director and State Director.—
(a) Either the Director of Selective Service or the State Director of Selective Service as to local boards in his state may appeal from any determination of a local board.

“(b) Either the State Director of Selective Service or the Director of Selective Service may take such an appeal at any time.”

It is thus evident that appellant had an avenue of relief open but that a fog of ignorance prevented him from taking it. At this juncture an Advisor would fulfill the function intended of him. An Advisor could have aided him and could have informed him that both the Director and the California State Director frequently intervene for registrants. In fact, it would have been the Advisor's duty to have placed the matter squarely before one or both of the directors. This Court has doubtless seen instances in the selective service files where appeals have been taken by officials to even the Presidential Appeal Board despite the fact that the letter of the law countenances such an appeal by a registrant only when the State Appeal Board renders a split decision. Appellant, therefore, has been deprived of very important administrative rights by the failure to post the names.

This phase of the subject has been considered in an unreported decision by Judge Peirson Hall in *United States vs. Kariakin*, No. 23223, S. D. California, January 12, 1954:

“MR. TIETZ: Your Honor has heard me on all the material points that I wish to present.

THE COURT: Very well.

I am inclined to think that your point is good in connection with the matter of not being properly advised of his rights. You call it a matter of defective notice.

MR. TIETZ: Yes, sir.

THE COURT: I do not know that it could be so classified as a defective notice because I do not

know that they are required by any regulation to give a notice which includes that.

MR. TIETZ: But they do. That is what I was trying to establish.

THE COURT: They do that as a matter of practice and it is not—in other words, I do not think the practice can result in the creation of a right to a person to commit a crime, but I do think that under the regulations and the Selective Service procedure that these men are entitled to have advisors and persons performing the function of advisors and they are entitled to be able to look to them for advice and to be told by them what their rights were. In this case he was entitled as a matter of right to receive the fair summary of the adverse testimony if he requested it, but he was never advised that he had the right to request it, either by the notice and the fact that they do now contain that notice, which I understand you stipulated to is evidence that the Selective Service System recognizes that they are entitled to have that advice and were entitled to have that advice.

For that reason I think that the defendant here was deprived of his right to that advice and that the regulations were not followed in that respect and he should be and is acquitted, and his bond is exonerated.

MR. TIETZ: Thank you."

It is submitted that the failure to post the names and addresses of Advisors to Registrants, as required by the regulations, requires a reversal of the judgment of conviction.

III.

**APPELLANT WAS DENIED DUE PROCESS ON
AND AFTER DECEMBER 6, 1951 WHEN THE
LOCAL BOARD REFUSED TO REOPEN, OR TO
EVEN CONSIDER REOPENING, HIS CLASSI-
FICATION.**

Appellant believes he established at least a *prima facie* case with his initial evidence. Nevertheless, after he was placed in the conscientious objector classification in November 1951 he was able to present further and up-to-date evidence of his ministerial status, and of a type not heretofore considered.

In addition to his self-serving letter of December 6, 1951 [Ex 36] he then and subsequently sent documents to show he was currently acting as a minister, documents of a nature not previously filed with the board. [Ex 37, 38, 40, 41] They indisputably showed that he was publicly preaching. These exhibit pages bear no date stamp date of the local board but the printed dates thereon show they cover the period of December 2 to February 15, 1952. Also, exhibits 37 and 41 make clear he was not preaching as a student but as a minister. This new evidence is of importance when viewed in conjunction with the evidence on page 44 of the Exhibit, given to the army induction station by the local board on July 18, 1952.* There, the

*Note the first printed line on the form:

"Section 1-General (Local Board will prepare from latest information available.)" [Ex 44]

board informed the army inducting officers that its registrant was "Unemployed except when necessary or convenient; then only for relatives. Holds no full or part-time job."

It is thus clear that not only was there no basis in fact for originally denying him the IV-D classification but that the board erred in not reopening his classification after December 6, 1951, when he presented new evidence, not before considered, of his IV-D status. There is nothing in the file, up to at least July 18, 1952 to rebut his evidence; on the contrary, the board itself admits that he had no other regular work.

However, it is not necessary that this Court find either that appellant should have been classified as a minister or that there was no basis in fact for the denial of the ministerial claim. The Court should find that he was entitled to have his case considered by the local board for the purpose of determining whether the case should be reopened; that §1625.2 required such consideration and that §1625.4 required that he be notified of its consideration and refusal to reopen. Also, he should have had an administrative review. When the local board ignored his request for review and ignored his new evidence for reopening, it committed two wrongs and in each deprived him of his right to an administrative review.

This argument is supported by the holding in *Hull vs. Stalter*, 1945, 151 F. 2d 633, where it was said that a non-exempt lawyer could run for election as a judge, get elected, and be entitled to exemption by his change

in status. In such a situation the board must have some real, substantial reason or evidence why it does not exercise its discretion and reopen the classification. Here the same situation existed.

In other cases it has been held that even the late filing of a special form for conscientious objector has been basis for a request for a reopening.—*United States vs. Clark*, W.D. Pa., 1952, 105 F. Supp. 613. Also see *United States vs. Crawford*, N.D. Calif. 1954, 119 F. Supp. 729.

This case is similar to that of *United States vs. Nimori*, No. 33680, N.D. Calif. S.D. (September 25, 1953). In that case a judgment of acquittal was rendered by Judge Roche. Among other things, he said:

“Thereupon, after due consideration the Court finds that the defendant was classified in I-A in December of 1948; that thereafter defendant presented facts and information not considered when defendant was originally classified and which, if true, would justify a change in defendant’s classification; that the local board’s refusal to reopen said classification and grant defendant the right to a personal appearance or appeal was an abuse of discretion and was in violation of Section 1625.2 and Section 1625.4 of the Selective Service Act and Regulations and the procedural rights of defendant guaranteed under the Selective Service Act and Regulations have been denied him, and therefore the defendant is not guilty as charged.”

Another case is that of *United States vs. Nichols*, No. 22951-HW, S.D. Cal. C.D. (December 14, 1953). In that case when the defendant registered he did not say that he was a minister of religion. He was then classified by the local board. Thereafter he filed a timely notice of appeal. He was classified I-A by the appeal board. When the case was returned to the local board Nichols submitted new evidence showing that he was a minister of religion. He requested the local board to reopen and consider his case anew. The court held in that case that there was a violation of Section 1625 of the regulations by the local board when it refused to reopen and reconsider the claim for classification as a minister of religion. In that case the court said, among other things:

“ . . . There now appears in Defendant's selective service file considerable evidence in support of his claim that he is a minister. The local board possibly could have found the presented evidence would not justify a change in classification, and, consequently, it could have refused to reopen. However, if the local board determines that the new facts would not justify a change in classification and refuses to reopen, the regulations provide:

“ ‘In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file.’ ”

[No such letter, or any notice whatsoever, was sent appellant Frank. The file is bare.]

“We are not now attempting to pass upon the validity of defendant’s claim that he is entitled to a ministerial classification. He did, however, make that claim to his local board. The local board by refusing to reopen the case took away from registrant the right to have the matter passed upon by the appeal board. We do not believe it was the intent of Congress to place with the local boards the arbitrary right to determine when a registrant should be entitled to an appeal. The local board might very well disagree with the registrant’s contention, but local boards should be vigilant at all times to see that registrants have a right to test their opinions upon appeal. It seems to the court that the action of the local board in this case was arbitrary, as it took away from registrant the right to present to the appeal board his claim that he was a minister.”

Another case is *Berman vs. Craig*, 3rd Cir., 207 F. 2d 888. In that case the registrant notified the board that he had become a full-time theological student after he was classified. The court held that the local board was required to reopen and reconsider the classification of the registrant.—See 207 F. 2d, at pages 890-891.

Another more recent opinion has been rendered in the case of *United States vs. Lacasse*, No. 23222-PH, on the docket of the United States District Court for the Southern District of California, Central Division. The motion for judgment of acquittal was sustained by the court on January 13, 1954. Among other things, the judge said:

“The only means under the law by which this registrant could get before the Appeal Board the same thing that was before the Department of Justice and the same thing that was before his local board after these letters were filed with the local board was by a reopening.

“He could not under the regulations appeal from merely a review, but had the draft board reopened his case and again classified him as I-A he then would have had the right of appeal so that the Appeal Board would have had an opportunity to have before them the same thing which was before the Department of Justice when they recommended that he be classified as a conscientious objector.

“I am satisfied that under the Nichols case that it was the duty of the draft board under that state of facts to have reopened the case so as to have permitted him—maybe they would have reached the same conclusion that the Department of Justice did, the Appeal Board to the contrary notwithstanding—but had they reached the same conclusion they previously did it would have afforded this registrant an opportunity to get before the Appeal Board the things which were not before them on the previous hearing.

“For that reason I think that the action of the local board was arbitrary and that there has been no commission of an offense and the defendant is acquitted.”

The latest cases dealing with reopening and with the equally important matter of *considering* new evi-

dence for the purpose of reopening, are in accord with appellant's position.

In *Olvera vs. United States*, 5th Cir., June 17, 1955, 223 F. 2d 880, the court distinguished *Witmer vs. United States*, 75 S. Ct. 392:

"For another reason, this case is distinguishable from Witmer's case, in which the Court held that where in reality the local board *does* hear and consider the new contention but declines to make the formal entry of a 'reopening' and 'reclassification' while notifying the registrant that his I-A classification would be continued, and 'no prejudice is claimed,' there was no denial of a substantial right of the registrant. In the Witmer case, the action of the local board was reviewed by the appeal board to which the file was sent. Here the failure to rule formally on the request to reopen and reclassify denied Olvera of his right to an appeal from this adverse action. In fact Olvera was not even notified of his retention in Class I-A except that the local board 'processed him for induction.' " [883]

cf. *United States vs. Henderson*, 7 Cir., June 9, 1955, 222 F. 2d 421.

Also see:

United States vs. Ransom, 7 Cir., June 16, 1955, 223, F. 2d 15.

The refusal to reopen appellant's classification was a denial of due process; the refusal to consider to re-

open was itself a denial of due process, each requiring a reversal.

IV.

THE GOVERNMENT HAS WHOLLY FAILED TO PROVE A VIOLATION OF THE ACT AND REGULATIONS AS CHARGED IN THE INDICTMENT.

This argument deals only with the first count in the indictment and with that part of the verdict and the judgment based thereon.

The evidence necessary to sustain this count is lacking. The file shows that appellant was first ordered to report on February 23, 1954, and directly to the Los Angeles Department of Charities [Ex. 130]; that subsequently he was ordered to report on June 11, 1954 to the office of the local board for instructions to proceed to the place of employment. [Ex. 148]

It is appellant's position that his offense, if any, is singular, not plural and that the first "delinquency" was waived and cured by the subsequent administrative action. Whether the administrative agency may, by plural orders, multiply the criminal jeopardy of its registrant is not involved here although such action may be morally and legally improper. Involved here is a simple substitution of one administrative order for another.

There is no doubt concerning the intent of the Selective Service System to give appellant an order

to do this particular civilian work; or concerning the intent of appellant to do no work that interfered with his ministerial commitment.

The conduct of each was at all times, consistent with the intent of the party. One set of circumstances, not multiple ones, was contemplated and was carried out. The two sets of circumstances set forth in the two counts of the indictment were as identical as the agency could make them and the second was unquestionably intended as a duplicate substitution for the first; the second order was issued *only* because the agency considered the first one void.

The chief evidence on the subject is the letter of advice from the General Counsel of the Selective Service System to the State Director. The letter concludes:

“In view of this procedural error it is not possible to recommend prosecution at this time. The cover sheet is returned so that the local board may issue another Order to Report for Civilian Work.”
[Ex 143]

It is crystal clear from this letter and from the subsequent correspondence and acts of the parties that each considered the second trip to Los Angeles *solely* as a substitute for the first.

It must be concluded that the first trip was considered a technical nullity and that the second was ordered solely to cure the defect. A judgment of conviction based upon the first count was not only something not contemplated, but something directly con-

trary to the waiver intent of the Selective Service System.

Appellant therefore submits that the Court should at least reverse that part of the judgment based on the first count in the indictment.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,
J. B. TIETZ,
Attorney for Appellant.

No. 14787

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD WAYNE FRANK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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FILED

OCT 26 1955

PAUL P. O'BRIEN, CLERK

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No. 14787

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD WAYNE FRANK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on January 12, 1955 [Tr. pp. 3-6]. The indictment charges appellant in two counts with a violation of Section 462, Title 50, App., United States Code.

On February 7, 1955, appellant was arraigned before the Honorable Ernest A. Tolin, United States District Judge, and entered a plea of not guilty to both counts of the indictment. Trial was had on March 2, 1955, before Judge Tolin, and at the conclusion of the trial, the Court found appellant guilty as charged [Supp. Tr. p. 3].*

*"Supp. Tr." refers to the Supplemental Transcript filed in type-written form.

The judgment and commitment following the finding of guilty was filed on March 3, 1955 [Tr. pp. 10-12]. Notice of appeal was filed on March 3, 1955 [Tr. p. 13].

The District Court had jurisdiction of the cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code. This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

STATUTE INVOLVED.

The indictment in this case was brought under Section 462 of Title 50, App., United States Code.

It provides in pertinent part:

“(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Secs. 451-470 of this App.], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said Secs.], or rules, regulations or directions, made pursuant to this title [said Sec.] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment. . . .”

III.

STATEMENT OF THE CASE.

The indictment returned on January 12, 1955, charges that appellant was duly registered with Local Board No. 31, and was thereafter classified I-O. Count One of the indictment alleges that appellant was ordered to report for civilian work contributing to the maintenance of the National Health, Safety, and Interest on February 23, 1954, and that appellant did knowingly and willfully refuse to accept said employment. Count Two charges that appellant was ordered to report for civilian work contributing to the maintenance of the National Health, Safety, and Interest on June 18, 1954, and that appellant knowingly and willfully refused to accept such employment [Tr. pp. 3-5].

On February 7, 1955, appellant appeared for arraignment and plea before the Honorable Ernest A. Tolin, United States District Judge. Appellant was represented by his attorney, J. B. Tietz, Esq., and entered a plea of not guilty.

Trial was held before the Honorable Ernest A. Tolin on March 2, 1955, and at the conclusion of all the evidence appellant was found guilty as charged in the indictment [Tr. pp. 10-12].

On March 3, 1955, appellant was sentenced by Judge Tolin, as follows: Count One: Appellant was committed to the custody of the Attorney General for a period of four years, but execution of the sentence was suspended and appellant placed on probation for a period of three years on condition that he enter civilian employment contributing to the National Health, Safety, and Interest and remain so employed for three years. Count

Two: Imposition of the sentence was suspended and appellant placed on probation for a period of two years, to commence and run upon the expiration of probation on Count One [Tr. pp. 11-12].

Appellant assigns as error the judgment of conviction on the following grounds: (1) The District Court erred in failing to grant the motion for judgment of acquittal; (2) the District Court erred in convicting the appellant and entering a judgment of guilty against him (Appellant's Br. p. 10).

IV.

STATEMENT OF THE FACTS.

On September 16, 1948, Richard Wayne Frank registered under the Selective Service System with Local Board No. 31, Martinez, California. He gave his date of birth, October 13, 1929, and was at that time eighteen years old [Ex. p. 1].*

On November 1, 1948, appellant filed his classification questionnaire [Ex. pp. 5-12]. In it, he claimed to be a minister [p. 7], and also a Conscientious Objector [p. 12]. At or about the same time, appellant filed a number of documents in support of his claim that he was a minister [Ex. pp. 16-26].

On November 30, 1948, appellant filed a Special Form for Conscientious Objectors [Ex. pp. 29-35]. On September 20, 1949, appellant was classified IV-E as a Conscientious Objector, by a vote of two to nothing, and on September 21, 1949, a Notice of Classification was mailed

*"Ex." refers to the exhibit which is appellant's Selective Service file.

him [Ex. p. 13]. Appellant did not appeal this classification or in any way communicate with the Local Board until December, 1951. In fact, appellant began "full time" secular employment as a milkman in December, 1949 [Tr. p. 31; Ex. p. 39].

On November 19, 1951, appellant was classified I-O by the Local Board, by a vote of three to nothing [Ex. p. 13]. On November 20, 1951, Notice of Classification was mailed appellant [Ex. p. 13]. On December 7, 1951, appellant personally went to the Local Board and presented a letter requesting a personal appearance before them [Ex. p. 36]. Appellant testified [Tr. pp. 19-20] that he advised the Clerk at the Local Board that he had received the notice late because it had gone to the wrong address. Appellant did not include this in any of the written material he submitted to the Local Board, nor did he assert to the Local Board that he was requesting a personal appearance within ten days of the receipt of the notice.

On December 17, 1951, appellant advised the Local Board that he was married, and that since December 1, 1949, he had been employed by Golden State Dairy as a milkman [Ex. p. 39].

On July 18, 1952, appellant was ordered to report for an Armed Forces physical examination [Ex. p. 42], and on August 1, 1952, he was advised that he was fully acceptable for induction [Ex. p. 43].

On October 23, 1952, appellant was mailed an Application of Volunteer for Civilian Work [Ex. p. 63], which form was not returned by appellant [Ex. p. 64].

On March 23, 1953, appellant was mailed a Special Report for Class I-O registrants [Ex. pp. 65-68]. In

that report, appellant offered to perform civilian work at Goodwill Industries in Stockton [Ex. p. 66], and revealed that since September, 1952 he had been employed as a roofer at \$112.00 a week [p. 67].

Following some further correspondence with regard to civilian work, appellant appeared before the Local Board at their request on April 6, 1953, to discuss civilian employment. While there, appellant advised the Local Board that he would accept employment with Goodwill Industries at Stockton, California [Ex. p. 82], and signed a statement to that effect [Ex. p. 80]. On May 15, 1953, the Local Board was advised that appellant had been to Goodwill Industries at Stockton, California, but rejected employment there because the wages were too low [Ex. p. 93].

On June 22, 1953, the Local Board was advised by Goodwill Industries at Oakland, California, that appellant had visited there with respect to employment [Ex. p. 100], and on July 6, 1953, appellant appeared at the Local Board to state that he would not work for Oakland Goodwill because it did not pay enough to suit him. He also advised that he would not consider employment at Mendocino State Hospital [Ex. p. 104]. Meanwhile, appellant took a five-week vacation to New York [Ex. pp. 104-105].

On July 25, 1952, appellant advised the Local Board, from New York, that he would not accept employment with Goodwill Industries at San Diego because the job did not pay enough [Ex. p. 109].

On February 10, 1954, appellant was mailed an order to report for civilian work, ordering him to report to the Los Angeles County Department of Charities on Feb-

ruary 23, 1954 [Ex. p. 128]. Appellant reported but refused to accept the employment [Ex. p. 132].

On June 1, 1954, appellant was mailed another order to report for civilian work, ordering him to report to the Local Board on June 11, 1954, to receive instructions to proceed to the place of employment [Ex. p. 148]. Appellant reported to the Local Board and was ordered to report to the Los Angeles County Department of Charities on June 14, 1954 [Ex. p. 158]. Appellant reported but refused to accept the employment [Ex. p. 152; Tr. p. 38].

V. ARGUMENT.

POINT I.

Appellant Was Given Due Process by the Local Board.

Appellant's argument in Point I of his brief is really two-fold: (1) That appellant did not receive a personal appearance before the Local Board; and (2) that appellant did not receive an appeal.

Appellant's Selective Service file [Ex. p. 13] reveals that he filed his Classification Questionnaire in October, 1948 [Ex. p. 5], and at approximately the same time submitted a number of other documents in support of his claim that he was a minister. In September, 1949, appellant was classified IV-E as a Conscientious Objector [Ex. p. 13]. Over two years later—and over three years from the time appellant submitted the information concerning his ministry—appellant was reclassified I-O, also a Conscientious Objector classification [Ex. p. 13]. A notice of classification was mailed appellant on November 20, 1951. Ordinarily, a registrant has ten

days from the *mailing* of that notice, to request *in writing* a personal appearance before the Local Board, or an appeal, or both. See Selective Service Regulations 1624.1(a) and 1626.2(c)(1), (32 C. F. R. 1624.1(a) and 1626.2(c)(1)).

The section relating to an appearance before the Local Board, Section 1624.1(a), grants to every registrant the right of a personal appearance provided "he files a written request therefor within 10 days after the Local Board has mailed a notice of classification (SSS Form No. 110) to him." The regulation then provides: "Such 10-day period may not be extended." The facts here reveal that the registrant made a written request for a personal appearance on December 7, 1951 [Ex. p. 13], seventeen days after the Notice of Classification was mailed him.

Appellee assumes that this 10-day period may not be extended if the notice of classification was properly sent. In this case, appellant testified [Tr. p. 20] that the notice of classification was not sent to his correct address and that he received it late. However, the 10-day period would surely begin to run *no later* than the date of the actual delivery of the notice, and ten days from that date the Local Board would lose *jurisdiction* to grant him a personal appearance. Thus, before a registrant can be given an appearance requested after the 10-day period, it is necessary for him to explain to the Local Board (a) that he did not receive the notice of classification in the ordinary course of the mails; (b) that the delay was not his fault; and (c) that his request for an appearance before the Local Board is made within ten days from the date the notice was received.

Assuming, then, that appellant had a right to a personal appearance if he met the requirements just outlined, appellant in this case failed to carry this burden of proof. Appellant *did not testify* that he made the request within ten days of the receipt of the notice of classification. He did not testify that he *told the Local Board* that he was making the request within the ten-day period [Tr. p. 20].

The question of whether appellant was entitled to a hearing when requested late, is a question of law. But the question of the weight and persuasiveness of the evidence offered by appellant to show that he met the requirements for a late appearance is a question of fact for the trier of fact to determine. In this instance, the trial judge must have determined that appellant did not carry his burden of proof. And, as just noted, there is good reason for this conclusion by the trial judge. Appellant did not testify that he made his request for a personal appearance within ten days after the receipt of the notice. In appellant's letter to the Local Board requesting the personal appearance [Ex. p. 36], he makes no mention of receiving the notice late or of making the request within ten days from the date of receiving the notice. This was appellant's last classification [Ex. 13], and he is required to carry the notice of classification with him at all times (SSS Reg. 1723.5). He did not produce this card at the trial to prove that it was sent to the wrong address.

It follows, therefore, that even if appellant would be entitled to a personal appearance when requested after the ten-day period, such a right would only arise upon a proper showing by the registrant. In this case there

is no evidence that appellant made such a showing to the Local Board, and that showing is *jurisdictional* to the Board's power to permit the appearance.

The Universal Military Training and Service Acts does not give a registrant a "personal appearance." This privilege arises solely from the Regulations. It could be abolished tomorrow. Thus, the 10-day limitation on requesting the appearance and the prohibition against extending that period does not involve due process of law. *George v. United States*, 196 F. 2d 445 (9th Cir., 1952).

Appellant also asserts that he was unlawfully deprived of an appeal. Appellant presupposes in his argument that he asked for an appeal and was denied one because he made the request too late. If such were the case, then Section 1626.2(d) of the Regulations, cited by appellant on page 17 of his brief, might be applicable and the issue then would be whether the Local Board was arbitrary in not granting appellant an appeal. But appellant did not ask for an appeal and, therefore, the section just named does not apply at all. Appellant's only communication with the Local Board relative to his classification, after he was classified I-O, is his letter dated December 6, 1951 [Ex. p. 36], in which he requests a personal appearance before the Board. No mention is made of an appeal, nor could the letter be construed as a request for an appeal because he specifically asked only for a personal appearance. As just noted, the personal appearance was properly denied by the Local Board because he failed to show them that the request was made within ten days of receiving the notice of classification, and the Local Board, therefore, had no jurisdiction to entertain a personal appearance.

POINT II.

Appellant Was Not Denied Due Process of Law Because the Local Board Did Not Have Someone With the Title of Advisor.

This issue has been many times argued before this Court in recent months, and it may be that by the time this appeal is ultimately determined, the question of advisors will be settled. Appellee submits that this issue does not involve due process of law. The duties of advisors are described in Section 1604.41 of the Selective Service Regulations (32 C. F. R. 1604.41) as “to advise and assist registrants in the preparation of questionnaires and other Selective Service forms, and to advise registrants on other matters relating to their liabilities under the Selective Service law.” There is no one in California with the title of “Advisor.” However, the Selective Service Regulations provide several other persons who perform those services. There are registrars (Sec. 1604.71), Government Appeal Agents (Sec. 1604.71), plus Local Board members, clerks, and employees available to assist registrants. Surely, then, the absence of someone with the title “Advisor” does not involve “a fundamental safeguard.” or offend our “concepts of basic fairness.” *Simmons v. United States*, 348 U. S. 397, 405-406.

The provision relating to advisors was amended in January 1955, and the words “shall be appointed” were changed to “may be appointed.” Thus, in January, the appointment of advisors became optional. Can it now be said that, without advisors, all registrants processed since January 1955 are being denied due process of law? What is due process of law in 1955 was due process of law in 1954. The statutory scheme announced by Congress

is the same. The regulations promulgated under the Act of Congress is the same except for one word.

The District Court considered this point and rejected it [Supp. Tr. p. 2], *after* the decision in *Chernehoff v. United States*, 219 F. 2d 721 (9th Cir., 1955).

POINT III.

Appellant Was Not Denied Due Process of Law in Connection With a Reopening of His Classification, Because the Local Board Was Never Asked to Reopen Appellant's Classification.

Selective Service Regulation No. 1625.2 (32 C. F. R. 1625.2) covers the reopening of classifications by the Local Board. It provides:

“The Local Board *may* reopen and consider anew the classification of a registrant (a) upon the *written* request of the registrant * * * if such request is accompanied by written information presenting *facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification* * * *.” (Emphasis added.)

Appellant was classified I-O on November 19, 1951 [Ex. p. 13]. Thereafter, on December 7, 1951, he presented a letter requesting a personal appearance before the Board, which the Board, as previously noted, could not grant him under the law [Ex. p. 36]. At or about the same time, appellant submitted a pamphlet to the Local Board [Ex. pp. 37, 38], and on April 7, 1952, submitted another pamphlet [Ex. pp. 40-41]. Appellant did not ask for a reopening of his classification and, above all, he made no such request in *writing* as required by the regulations. Therefore, it can hardly be urged that the Local Board denied him due process in that regard.

But appellant urges in his brief (p. 33) that the new evidence consisting of the two pamphlets indisputably show that he was a minister. The new evidence certainly does not compel that conclusion, and in fact he was not a minister. His letter [Ex. p. 36], merely states that he believes he is entitled to another classification—probably the complaint of most registrants in Class I-A, I-A-O, or I-O. The first pamphlet announces that the registrant is giving a speech and describes him as “representative” of the Watch Tower Society [Ex. p. 37]. The second pamphlet describes the activities of the Theocratic Circuit Assembly of Jehovah’s Witnesses on the week-end of February 15 through 17, 1952. This pamphlet reveals that appellant is giving a speech on that week-end along with fourteen other people [Ex. pp. 40, 41]. This “new evidence” hardly characterizes appellant as a minister. Many citizens participate in church activities, including giving speeches and bible study, but that in no respect qualifies that ordinary citizen as a minister.

The reason appellant’s showing is so meager is obvious, for *in fact* during this very period of time the registrant was working “full time” for a dairy [Tr. pp. 30, 31; Ex. p. 39], and he was not a minister at all. It should be remembered at this point that all other evidence submitted by appellant relating to church activities was at this period three years old. Thus the Local Board could hardly resist the conclusion—if called upon to reach a conclusion at all—that appellant was not at this time acting as a minister. He had, for over two years, accepted the classification of a Conscientious Objector without complaint [Ex. p. 13], and during this entire period of time appellant had submitted no other evidence of ministerial activities. Further, appellant had failed to advise the Local Board, and

concealed from them for over two years, the fact of his full time employment—this, in spite of the express command of the Selective Service Regulations.

“Each classified registrant * * * shall, within ten days after it occurs, report to the Local Board in writing any fact that might result in the registrant being placed in a different classification, such as, but not limited to, any change in his *occupational* * * * status * * *.” (Sec. 1625.1(b); emphasis added.)

The appellant was, therefore, required under the law to furnish the information concerning his employment. Selective Service Regulation 1623.1(b) (32 C. F. R. 1623.1(b)), provides:

“The registrant’s classification shall be determined solely on the basis of the official forms of the Selective Service System, and such other written information as may be contained in his file; provided, that the Local Board shall proceed with the registrant’s classification whenever * * * (3) *he fails to provide the Local Board with any other information concerning his status which he is requested or required to furnish.*”

Appellant’s theory here must be that the new evidence he submitted following his classification on November 19, 1951, commanded a reopening or reconsideration by the Local Board. The inadequacy of that evidence has already been discussed, and in addition, the regulations provide that a request for a reopening by a registrant must be in *writing*.

Appellant also complains that the Local Board, upon receiving the new evidence, was required to advise the registrant that they refused to reopen—apparently on the theory that appellant could appeal from this decision by

the Local Board. The Local Board was not required to so advise the registrant because they had received no request for a reopening of his classification.

In any event, it would not affect appellant's substantial rights since such a decision by the Local Board would give appellant no right of appeal.

Skinner v. United States, 215 F. 2d 767 (9th Cir., 1954);

United States ex rel. LaCharity v. Commanding Officer, etc., 142 F. 2d 381 (2nd Cir., 1944).

Appellant's argument here is really the same as under Point I of his brief: The Local Board reached the right result but did so in the wrong manner. If appellant ever was a minister he ceased to be one in 1949, when he accepted what he, himself, termed "full time" employment [Tr. p. 31]. His principal objection at each of the several places where he was offered civilian work in lieu of induction was that the wages paid were not enough [see Ex. pp. 93, 104, 109]. (During the period of his interviews appellant was employed as a roofer at \$112.00 per week [Ex. p. 67].)

It should also be noted at this point that the court below specifically found that appellant waived his claim to be a minister and elected to proceed as a Conscientious Objector. "I find there was an election to proceed as a conscientious objector. I find that there was a waiver of the right to be classified as a minister" [Supp. Tr. p. 3], and "The whole file shows that the defendant waived." He accepted a Conscientious Objector's classification for over two years—from 1949 to 1951—without complaint [Ex. p. 13]. On April 6, 1953, he advised the Local Board that he accepted employment with Goodwill Indus-

tries in Stockton, California, and signed a statement to that effect [Ex. pp. 80, 82]; and, as just noted, appellant's objection to the civilian employment time and again, was based upon his objection to the low salary scale. Appellee is not asserting here that a registrant, by filing a Conscientious Objector's form and claiming a Conscientious Objector's classification, waives his claim to any other classification. Rather, appellee asserts—as found by the District Court—that there is a *factual* waiver of any claim for a ministerial classification.

POINT IV.

Appellant Was Properly Convicted on Both Counts of the Indictment.

Appellant was first ordered to civilian work in lieu of induction at the Los Angeles County Department of Charities on February 23, 1954 [Ex. p. 128]. He reported, but refused to work [Ex. p. 132]. Thereafter, he was again ordered to civilian work in lieu of induction at the Los Angeles County Department of Charities, and was ordered to report to the Local Board on June 11, 1954, to receive instructions to proceed to the place of employment [Ex. p. 148]. Appellant reported to the Local Board and was instructed to report to the Department of Charities on June 14, 1954 [Ex. p. 158]. Appellant reported on June 18, 1954, but refused employment [Ex. p. 148].

The question here does not involve the view of the Selective Service System of the procedure used in ordering appellant to civilian work. That view is immaterial. The issue with relation to each count is simply whether appellant did the proscribed act or failed to do the required duty. The facts show, and the District Court found, that he did.

A helpful case in this connection is *United States v. Bendik*, 220 F. 2d 249 (2nd Cir., 1955). There the registrant was charged with failing to report for induction. An indictment was returned, charging him with refusing to be inducted on February 13, 1951. At the trial, the proof showed that the registrant failed to report for induction on February 13, 1952. He was acquitted, and another indictment returned charging him with failing to report for induction on February 13, 1952. The registrant claimed prior jeopardy, but the Circuit Court observed, at page 251:

“A charge of refusal to report on order in February 1951, would support a conviction if proved. A charge of refusal to report in February 1952, on order subsequent to February 1951 would, if proved, support also a conviction of that separate crime.”

Conclusion.

Appellant was not denied due process of law by the Local Board. He waived any claim to a classification as a minister and elected to be a Conscientious Objector.

Appellant was properly convicted on both counts in the indictment.

Respectfully submitted,

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No. 14787

In the
United States Court of Appeals
For the Ninth Circuit

RICHARD WAYNE FRANK,	}
<i>Appellant,</i>	
vs.	
UNITED STATES OF AMERICA,	
<i>Appellee.</i>	}

Petition for Rehearing

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FILED

JUL 23 1956

PAUL P. O'BRIEN, CLERK

In the
United States Court of Appeals
For the Ninth Circuit

RICHARD WAYNE FRANK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 14787

Petition for Rehearing

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of Judgment entered by the Court on June 25, 1956, affirming the judgment of the court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features of the decision wherein he believes the Court may be convinced its opinion is incorrect.

The Court committed error in holding that the record showed no harm had been done appellant by the failure to reopen and the failure to have advisors.

The slip opinion (p. 5) states:

“We have previously held that the mere failure to appoint such advisors or the failure to post the names and addresses is not *per se* a denial of due process and that lack of due process exists only when substantial prejudice is shown.”

The slip opinion (p. 6) states:

“Next, appellant argues that he was denied due process when the Local Board refused to reopen, or to even consider reopening his classification. We hold against appellant on this point.”

The slip opinion (p. 7) states:

“The letter that appellant submitted was no a request for reopening, and even if we combine the letter with the pamphlet it still does not constitute a written request for a reopening.”

The holding of the Court that appellant did not make a proper, written request for reopening *per se* establishes harm; he could hardly have been more “substantially prejudiced.” It must be assumed that if he had the help of an Advisor he would have made a *good* request for reopening; also, that he would have filed a *timely* request for personal appearance and appeal.

A recent decision, made after the oral argument in this appellant's case, supports appellant's position. In *United States vs. Howard Louis Schwartz*, Cr. No. 43793, E.D. N.Y., decided March 15, 1956, Judge Abruzzo pointed out that:

“A registrant is not entitled to the aid of counsel before a local board. *United States vs. Pitt*, 144 F. 2d 169 (C.A. 2d); *Peterson vs. United States*, 173 F. 2d 11 (C.A. 6th); *Niznik vs. United States*, 173 F. 2d 328 (C.A. 6th). He, therefore, must depend upon the advisors for counsel as to his rights to a proper classification.

“The decisions are legionary that each and every requirement in the Selective Service Act must be strictly complied with. After he was classified I-O the defendant requested a reopening of his case and a setting aside of this classification on the ground that he was the sole support of his mother and father. The defendant testified that when he filed in the questionnaire he did not know that he could make a claim for exemption on two grounds, to wit, that he was a minister of religion and also the sole support of his mother and father. He did not urge the support of his mother and father because he was under the erroneous impression tht he could not claim more than one exemption at the same time, but if there had been a posted list of advisors he could have determined that he was entitled to make a claim of exemption on both grounds.

“The absence of such a posted list is vital in determining the guilt or innocence of this defendant.

“When defendant made application before the board for a reopening of his case in order that he might produce evidence that he was the sole support of his parents, the local board denied him this right. In view of the circumstances this right should have been granted. The proof offered by

the Government that a list of advisors was visible somewhere in the local board after 1948 is vague and uncertain. The Government had the burden of proving the defendant guilty beyond a reasonable doubt. This burden they have not sustained."

The slip opinion (p. 7) states that the pamphlet presented by him "does not in any way mean the speaker is a minister." An advisor could have learned of Frank's current further ministerial activity and of his actual status as a minister and could have advised him (a) of the standard required by the law and regulations, to wit, "vocation" and (b) of the manner of presentation the regulations require to justify a re-opening. It is common knowledge that appellant's type of religious activity has, in many instances, met the standards required for a selective service ministerial classification. Public sermons, such as the one advertised in the pamphlet, are obviously part of the ministerial activity of one of Jehovah's witnesses. That it, presented alone, and without further explanation, could and did justify the conclusion reached by this Court is something a selective service registrant can be excused for not realizing. An advisor could have set him straight, namely, that detailed explanation, etc., etc., should be presented in writing to meet the standard of the law.

We do not know from the record if appellant could have met the standard; we do know from the record he didn't have the opportunity for the advice then *required* by the law.

Wherefore, upon the foregoing ground, and for other reasons, appearing in appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. TIETZ

Attorney for Appellant.

